Supreme Court, U.S.
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No. 021179 FEB 6 2003

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In The
Supreme Court of the United States

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TERRANCE EDWARD ZERLA,

Petitioner,

vs.

JAMES ERWIN, WARDEN,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

(1) May the government use a criminal defendant's post-arrest silence as evidence to support an argument that his testimony was tailored to conceal his guilt without violating *Doyle v. Ohio*, 426 U.S. 610 (1976)?

(2) When a state court decision does not consider a properly raised federal claim, has such federal claim been "adjudicated on the merits" so as to require deference to the state court decision under 28 U.S.C. § 2254(d)(1)?

(3) When state law prevents a petitioner from access to information with which he can develop the record in a timely fashion, may such specific lack of development bar an evidentiary hearing under 28 U.S.C. § 2254(e)(2)?

(4) Is a finding of fact made by a state appellate court in reversing a petitioner's first conviction entitled to the presumption of correctness of federal *habeas* review of conviction upon retrial?

(5) Where police records demonstrate the testimony of police serologist and detective is false and misleading, is knowledge of such falsehood and mischaracterization imputable to the prosecuting attorney?

(6) May reliance on pre-AEDPA law in delaying the filing of a federal *habeas* petition containing exhausted claims in order to pursue factual development of non-exhausted claims exempt a petitioner from application of the AEDPA to his claims?

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OPINIONS BELOW AND CITATIONS THERETO

The Sixth Circuit affirmed the dismissal of Petitioner's first *habeas corpus* petition, and subsequently denied motions for rehearing and for rehearing en banc. Those opinions and orders appear in the appendix hereto at App. 1 and App. 66, respectively. A copy of the opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is appended hereto at App. 8. The district court's order denying a Civ.R. 59(e) motion appears at App. 64.

None of the orders or opinions are published.

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JURISDICTION

The Sixth Circuit's order sought to be reviewed was entered on April 25, 2002. A timely petition for rehearing was denied on September 09, 2002. On December 04, 2002, Justice Stevens extended the time for filing this petition to and including February 06, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTES AND CONSTITUTIONAL PROVISIONS

This case involves §§ 2254(d) and 2254(e) of the United States Judicial Code as amended by the AEDPA, subsection 2254(d) of the United States Judicial Code prior to amendment by the AEDPA, and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

28 U.S.C. § 2254 (West 1994 & Supp. 1998):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254 (West 1994):

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

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STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 2254(a).

Petitioner was charged in Franklin County, Ohio, with one count of kidnapping and three counts of rape, based on allegations of conduct on September 1, 1990. After a March 1991 conviction was reversed on appeal, petitioner was convicted at a jury trial and, in August 1993, sentenced to an aggregate term of 30 to 75 years.

The trial turned on the credibility of the claimant, who alleged she was forced to perform fellatio that resulted in ejaculation, as well as anal and vaginal intercourse within a period of less than one to three minutes.

Ex. P, pp. 130-32; Ex. V, p. 285. In reversing Petitioner's first conviction, the Ohio Court of Appeals said that "(b)ecause there was virtually no physical or medical evidence . . . the state's case rests primarily on (the Complainant's) testimony." *State v. Zerla* (March 7, 1992), Franklin App. No. 91-AP-562, slip opinion, p. 2, 1992 WL 55433 (hereinafter referred to as "*Zerla I*"); Ex. A, p. 2. Therefore and obviously, since the Petitioner testified in his own defense, his credibility was likewise of paramount importance.

The State did not merely comment upon Petitioner's post-arrest silence. Its chief detective emphasized it, Petitioner was cross-examined regarding it, and the prosecutor condemned him for it in closing argument. T.p. 547, 549, 1153-54, 1157-58.

The *Doyle* issue contained in the first Question Presented was preserved by objection (T.p. 1024-34; 1.25), and was the subject of assigned error on direct appeal from Petitioner's *first* trial. *Zerla I.* Ex. A, p. 2. The Ohio Court of Appeals held that impeaching Petitioner because he remained silent prior to testifying "is a permissible method of impeachment which does not violate the rule in *Doyle* [*v. Ohio*, 426 U.S. 610 (1976)]." *Zerla I.* Ex. A, pp. 6-9. The Court of Appeals, however, reversed on other grounds. Thus, Petitioner was stuck with the *Zerla I* holding that permitted this use of post-arrest silence as the law of the case on retrial. Petitioner's *Doyle* claim was exhausted on cross-appeal in the Supreme Court of Ohio. *State v. Zerla*, 594 N.E.2d 970 (Ohio 1992).

On direct appeal from conviction at retrial, Petitioner assigned as error that "testimony regarding appellant's successful *pro se* public records *mandamus* action . . . served to penalize the appellant for exercising his rights."

Brief of Appellant. Ex. 4. It was the state's position that Petitioner fabricated his testimony at the first trial with police records he did not obtain until long after that trial. Citing *Doyle v. Ohio, supra*, Petitioner argued that the Court of Appeals had suggested in *Zerla I* that this line of questioning could go too far and that emphasizing Petitioner's *pro se* status in obtaining police records was a thinly veiled attempt to make Petitioner look guilty for having exercised the right to remain silent in the first place. Brief of Appellant; Reply Brief of Appellant; Ex. 4; Ex. 6. The Court of Appeals rejected this argument:

> [T]his court previously decided in this case that a line of questioning which involved defendant's post-arrest silence in an attempt to "establish that the defendant was given an outline of the state's case against him and ample time to fashion a story which incorporated as many of these facts as possible" was permissible. *State v. Zerla* (December 22, 1994), Franklin App.No. 93APA 09-1304, 1994 WL 714456 (hereinafter referred to as *Zerla II*.)

See also Ex. 7.

As demonstrated in Exhibit U, pp. U20-U40, Petitioner requested appellate counsel to raise that part of the claim which had not already been exhausted on cross-appeal in the Supreme Court of Ohio in 1992. When Petitioner realized that counsel failed to raise the additional error, he promptly prepared a Supplemental Memorandum in Support of Jurisdiction asserting the new aggravating facts under his *Doyle* claim from his first appeal and turned it over to prison officials for posting six days prior to the deadline. Because prison officials failed to mail it until the day after the deadline, it was rejected by the Ohio Supreme Court clerk. In a motion for delayed appeal, Petitioner argued that the mailbox rule of *Houston v. Lack*, 487 U.S. 266 (1988), applied. His motion for delayed appeal was denied on a 4-3 vote. *State v. Zerla*, 647 N.E.2d 495 (Ohio 1995) (*Moyer, C.J., Wright, and Cook, JJ., dissenting*).

In the district court, Petitioner claimed that his conviction was obtained by penalizing him for his "post-arrest silence and his exercise of other constitutional . . . rights . . . and for the state's application of its own procedural rules." Amended Petition, Ground 5. The district court found that the *Doyle* claim was merely a question of state evidentiary law. App. 48.

Pointing out that the district court reviewed the claim under an erroneous standard, Petitioner raised his *Doyle* claim in the Sixth Circuit. Brief of Appellant, pp. 56-59. That court, relying on this Court's decision in *Poruondo v. Agard,* 529 U.S. 61, 74-75 (2000), denied the claim, apparently because part of it dealt with impeachment for exercising statutory rights and following state law. The Sixth Circuit did not address the *Doyle* portion of Petitioner's claim.

Respondent has not raised any exhaustion or default defense to any of the claims raised herein. Moreover, no counsel for Respondent has ever contested the merits of Petitioner's *Brady* and use-of-false-testimony claims in any court. C.A. App. 1317-18. In rejecting these claims, the Sixth Circuit found suppressed police records and false testimony about them by police experts not to be material because the complainant's "testimony was corroborated by the several witnesses and the records of her injuries." App. 5. Neither Respondent nor any court previously has questioned that this case turns on the credibility of the Complainant's story. The Sixth Circuit's decision fails to acknowledge the state appellate court's fact-finding, fails to accord it the presumption of correctness to which it is entitled, and has erred as the result.

In any event, the "injuries" relied on by the Sixth Circuit so as to immunize the allegations from impeachment were a redness under the tongue (T.p. 421) and scratches on the lower part of the back. T.p. 423. Both were consistent with Petitioner's testimony that the Complainant's back was pressed against an exterior stucco wall (T.p. 543) during consensual kissing and fondling and that the Complainant slid down against that stucco wall. T.p. 942-46. The examining physician acknowledged that redness under the tongue was consistent with heavy french kissing. T.p. 437-38. Moreover, Complainant's story that Petitioner grabbed her lower jaw by sticking fingers in her mouth was contradicted by the absence of any corresponding thumb mark under her jaw. T.p. 422, 1. 23. Furthermore, a pelvic exam was normal and there was no finding of trauma. T.p. 398, 439. Although the Complainant claimed to have been forced violently to her knees on gravel, *see* T.p. 544, her knees were unmarked. T.p. 423, 1. 8; p. 490. And, although she claimed that she was restrained and constantly choked with hands around her throat the whole time, neither the detective, physician, or nurse observed any marks, or even redness, on her throat, neck, shoulders, or arms which they testified they would expect to find. T.p. 420, 423, 490, 582.

The "several witnesses" were also a wash, if not more favorable to Petitioner. Nikki Visnic and Diana Popyak claimed to have seen a man and a woman going west down the alley behind their apartment to the place where

Petitioner and Complainant were for that minute or two. On cross-examination, however, Visnic admitted that she could not have seen, as she claimed to have, the man's hand over the woman's mouth from where she was. T.p. 729-30. If anyone had seen kidnapping from the window, they would have called the police. They did not. T.p. 732-33. If anyone had seen a violent crime from the window, they would have warned Doug Staysniak before sending him out. They did not. He was only told that someone was heard crying. T.p. 678, 743.

Consistent with Petitioner's testimony (T.p. 940, 943), the Complainant was crying intermittently and attracted the well-meaning attention of Visnic and Popyak. Visnic admitted that she assumed rape because that is what she "always" thought when she heard a woman crying. T.p. 736, 1. 2-4. But no one claimed to have heard the Complainant – whom they had no trouble hearing – cry for help, or ever to have heard her, even after Petitioner left, claim to have been raped before police appeared looking for a rape victim. T.p. 683-84, 733, 736, 757-58.

Popyak testified that the woman in the alley appeared to be "going at her own free will," T.p. 696, as well as that she could see from the window that both individuals were dressed and that no rape was occurring less than a minute before she and Staysniak approached them. T.p. 697-98. Both witnesses said that Petitioner was squatting next to the Complainant, who had just plopped down on the ground (sliding against the stucco wall), which was inconsistent with the testimony of the Complainant, who alleged that she was being raped vaginally in a standing position when the two witnesses ran up. T.p. 302. Staysniak did not see any intercourse. T.p. 757.

No party to this action, nor any court, has ever questioned that this case turned on the credibility of the Complainant's testimony. Moreover, no counsel for the State or Respondent has ever denied in any court any element of Petitioner's *Brady* and use-of-false-testimony claims, or denied that the suppressed police records show that defense expert testimony was improperly excluded. Petitioner has never previously had the assistance of counsel in presenting his *Brady* and use-of-false-testimony claims in any court, state or federal. Petitioner argued below that he was entitled to the assistance of counsel in raising these claims, at least in the first instance, under the Equal Protection, Due Process, and Right to Counsel Clauses. The Sixth Circuit rejected this argument. App. 7.

Petitioner spent over five years obtaining voluminous police records (Ex. B, C, D, E) through dozens of Ohio Public Records Act requests. The district court granted his motion to attach his exhibits to his petition but denied several motions for leave to conduct discovery and other fact-development motions. The district court rejected Petitioner's arguments that a hearing was mandatory because Ohio law prohibits the introduction of evidence obtained through Ohio's Public Records Act in a state post-conviction proceeding.

Thus, Petitioner did not fail to develop the state court record. Neither the district court nor Respondent ever contested or doubted Petitioner's allegations. Yet the Sixth Circuit *sua sponte* held that the district court "correctly found that no evidentiary hearing should be held, as the facts underlying Zerla's claims are not such that no reasonable fact finder would have found him guilty," citing 28 U.S.C. § 2254(e)(2). App. 7. This can only be because the Sixth Circuit found that Petitioner "failed to develop" the record in state court.

Petitioner exhausted grounds 1, 2, 3, and 5 of his petition in the state courts in 1995. In conscious reliance on his right to an evidentiary hearing and to *de novo* review of mixed questions of fact and law in the preferred single *habeas* petition under pre-AEDPA law, Petitioner decided to forego filing prior to April 21, 1996, to continue further factual development of his *Brady* and use-of-false-testimony claims in the state courts. He argued below that his reliance upon prior law in making this decision renders application of AEDPA to his petition impermissibly retroactive.

The Sixth Circuit rejected this argument stating that "it is well established that that [AEDPA] applies to petitions filed after its effective date. *Barker v. Yunkins*, 199 F.3d 867, 871 (6th Cir. 1999)." App. 6. Petitioner further argued that the petitioner in *Barker* had exhausted his claims prior to the effective date of AEDPA, but did not suggest that his delay in filing until after AEDPA went into effect was the result of a conscious decision in reliance on the then-current state of the law.

◆

REASONS FOR GRANTING THE WRIT

I

The decision of the Sixth Circuit below that *Portuondo v. Agard*, *supra*, controls this case compels the conclusion that that court believed that *Agard* implicitly overruled *Doyle v. Ohio*, 426 U.S. 610 (1976).

Agard approved a prosecutorial comment that the defendant had the opportunity to hear all other witnesses testify and to tailor her testimony accordingly, holding that it did not contravene the right to confrontation or to testify in one's defense. Whether or not the defendant had exercised his right to remain silent was never addressed in *Agard*.

In the instant case, the Sixth Circuit relied entirely on the fact that a portion of the prosecutor's long cross-examination would, in isolation, pass muster under *Agard*. But the prosecutor's generic impeachment strategy was substantially broader and more pervasive than that approved by *Agard*. Not limiting examination and argument to Petitioner's presence at trial, the prosecutor used Petitioner's exercise of the right to counsel and even used confidential communications between Petitioner and counsel regarding discovery and investigation in preparation of Petitioner's defense to show why Petitioner's testimony should not be believed. Moreover, unlike in *Agard*, the prosecutor in this case did make explicit and repeated references to Petitioner's exercise of the right to remain silent, twice in questioning a detective and several more times in summation. Thus, the facts of this case fall squarely under *Doyle,* and it is not *Agard* but *Doyle* which states the controlling law here.

Without analysis, the district court adopted Respondent's argument that the instant facts present merely an issue of state evidentiary law. Despite repeated references in the trial record to Petitioner's exercise of the right to remain silent, the Sixth Circuit likewise reduced the claim to a matter of state evidentiary law and, citing *Agard*, denied relief. The decision of the Sixth Circuit below takes *Agard* as having implicitly overruled *Doyle*. And, there is language in *Agard*, specifically that "there might be reason to reconsider *Doyle*," encouraging courts to disregard *Doyle* as ripe to be overruled with the next case presenting itself to the Court. *Portuondo v. Agard*, *supra*.

The question presented is an important and recurring issue, especially in cases like this where the physical evidence or other corroboration of the complainant's story is weak or non-existent and the case boils down to a battle over credibility. Especially in credibility cases, without further guidance from this Court, even a prudent prosecutor more confident in the merits of his case may become more aggressive, given the invitation presented by *Agard*'s possible suggestion that *Doyle* is ripe for reconsideration.

Whether or not criminal defendants continue to have *Doyle*-backed immunity from impeachment for the exercise of the right to remain silent has sweeping implications for trial preparation and strategy on both sides. Defense counsel may consider advising her client to be deposed before trial, and a whole new spin attaches to the question of whether the defendant takes the stand.

If *Doyle* is to be overruled, it should be done expressly and with reason, not by tacit proxy in a case with far different facts.

As set forth in question 6 presented for review herein, Petitioner would have raised this claim, exhausted in 1995, in a federal *habeas* petition prior to the effective date of AEDPA and/or in a petition for writ of certiorari on direct appeal but for the then-current state of *habeas* law which favored single *habeas* petitions (delayed to exhaust all claims) over a piecemeal petition filed before April 23,

1996. Thus, Petitioner has a substantial reliance interest in review of this claim under pre-AEDPA law. If *Doyle* is to be reaffirmed, Petitioner is entitled to relief and the decision of the Sixth Circuit below must be reversed.

Notwithstanding the decision of the state appellate court that "a line of cross-examination *which involved defendant's post-arrest silence* . . . was a 'permissible method of impeachment[,]'" *Zerla II*, Ex. 7 (quoting *Zerla I*, Ex. A) (emphasis added), was contrary to and an unreasonable application of clearly established federal law as determined by this Court. As recognized by the state appellate court in *Zerla II*, the trial record conclusively establishes that the prosecutor did, in fact, make explicit and repeated references to Petitioner's exercise of the right to remain silent and pursued "a line of cross-examination which involved defendant's post-arrest silence." But, use of the right to remain silent to impeach a defendant's testimony as a fabrication is precisely what *Doyle* forbids. That some of the comments the prosecutor made to suggest fabrication would have, if limited to that, passed muster under *Agard* hardly mitigates the repeated references to Petitioner's right to remain silent. Given the context, these comments no longer fall under *Agard* but aggravate the *Doyle* violation under these facts. The comment upon Defendant's exercise of the right to counsel and upon confidential communications between Petitioner and counsel regarding discovery and investigation in preparation of Petitioner's defense to impeach Petitioner's testimony is particularly egregious. The decision of the state appellate court in *Zerla II* and *Zerla I* that such references "involv[ing] defendant's post-arrest silence" by the prosecutor are "a permissible method of impeachment which does not violate the rule in *Doyle*[,]" is contrary to and an unreasonable application of the holding of this Court in *Doyle*. Thus, Petitioner is no less entitled to relief under AEDPA, mooting the retroactivity question, and the decision of the Sixth Circuit below must be reversed.

II

The decision of the Sixth Circuit determining what constitutes "adjudication on the merits" and what deference, if any, may be given to state courts on issues of federal law under 28 U.S.C. 2254(d) is in conflict with the decisions of every circuit with the exception of the Seventh.

The Sixth Circuit has construed the section to require deference to state court decisions even as to federal claims with which the state courts have been presented but have not considered. *Doan v. Brigano*, 237 F.3d 722, 730-31 (6th Cir. 2001); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). This construction effectively reads "adjudicated on the merits" out of the statute. *McCambridge v. Hall*, 303 F.3d 24, 35 (1st Cir. 2002) (*Brady* claim analyzed only under state standard compelled *de novo* review); *Sellan v. Kuhlman*, 261 F.3d 303, 309-13 (2nd Cir. 2001) (adopting Fifth Circuit test to determine whether a claim has been dispensed of substantively and, therefore, "adjudicated on the merits"); *Hameen v. Delaware*, 212 F.3d 226, 248 (3rd Cir. 2000) (because state courts only discussed state law, federal claims not "adjudicated on the merits" and subject to pre-AEDPA review), *cert. denied*, 532 U.S. 924; *Mueller v. Angelone*, 181 F.3d 557, 570 n. 9 (4th Cir.) ("[A] claim that was *not* adjudicated on the merits, even in a summary fashion, and which is not procedurally defaulted, would seem to fall outside the new section 2254(d) and its limitations on the scope of the habeas remedy."), *cert. denied*, 527 U.S. 1065 (1999); *Mercadel v. Cain*, 179 F.3d 271, 274-75 (5th Cir. 1999) (holding that one word denial of federal claim was not an "adjudication on the merits"); *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002) (pre-AEDPA review when state courts fail to adjudicate claims on the merits); *Green v. Lambert*, No. 01-35595, 2002 WL 453215, at *6 (9th Cir. Mar. 26, 2002) ("If there is no such decision on the merits [explaining reason for decision of federal claim], . . . there is nothing to which to defer."); *LaFevers v. Gibson*, 182 F.3d 705, 711 ("If the claim was not heard on the merits by the state courts, and the federal district court made its own determination in the first instance, we review the district court's conclusions of law *de novo*. . . . "); *Romaine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001) ([W]hen there is grave doubt about whether the state court applied the correct rule of governing federal law [because state court did not refer to federal law], § 2254(d)(1) does not apply."), *cert. denied*, ___ U.S. ___, 122 S.Ct. 1593 (2002).

While the other circuits do not fully agree within themselves as to when deference must be accorded to a state court decision as having "adjudicated on the merits" a federal claim, this only reinforces the need for this Court to bring consistency to this important and recurring question of federal *habeas* law. The Sixth Circuit's construction of § 2254(d) to require deference to a state court decision which has not considered a federal claim is not just different in degree but wholly different in kind from that of the other circuits such that there can fairly be said to be a direct conflict between the circuit which urgently needs to be resolved by this Court. Moreover, the construction of § 2254(d) by the Sixth Circuit to require deference to a state court decision which does not decide a federal claim clearly is an abandonment by a federal court of the "judicial Power" under Article III to say what the law is.

This question, thus, fairly includes whether a federal court may ever defer to a state court determination of federal law consistent with the Article III duty to determine federal law. Section 1 of Article III invests "the judicial Power" to say what the law is not just in this Court but no less in the inferior Article III courts. Having conferred jurisdiction to exercise "the judicial Power" over state *habeas* petitions through § 2254(a), Congress cannot require Article III courts – and Article III courts cannot allow themselves – to defer independent interpretation of federal law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79 (1803). Congress can hardly trump, or end-run around, the separation of powers doctrine with a state court's interpretation of federal law no matter how reasonably wrong a state court may be. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Congress specifically rejected the Kyl Amendment to AEDPA which actually used the word "deference." Article III courts should not forfeit that constitutional authority which Congress realizes it cannot take.

In *Schoenberger v. Russell*, 290 F.3d 831 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 16356, the Sixth Circuit decided not to reconsider *en banc* whether to reverse its minority view precedents, *Harris* and *Doan*, despite the urging to do so of two panel concurrences. *Id.* at 837-41 (Keith, J., concurring) (*Doan* skipped "adjudication on the merits" step before applying § 2254(d)); *id.* at 841-43 (Moore, J., concurring) ("I agree with Judge Keith that we may wish to consider en banc whether the pre-AEDPA standard of review should be applicable to state court decisions that do not mention or address federal claims at all)". The Sixth Circuit has considered and rejected the majority view in favor of a construction that presents a dire question as to the constitutionality of § 2254(d) under Article III. If the Sixth Circuit has got it wrong, this Court will have to tell it so by granting certiorari. The same goes if the Sixth Circuit is the only one to get it right. The question has been considered at length by virtually every Circuit, rendering a well-developed body of thoughtful decisions. The question is ripe for review by this Court. Consistency in the law on this important and recurring issue is urgently needed.

III

With regard to the right to an evidentiary hearing where there is no remedy for violation of federal law in which the record may be developed under state law, the Sixth Circuit's decision is in direct conflict with this Court's holding in *M. Williams v. Taylor*, 529 U.S. 420 (2000), that a petitioner does not fail to develop the factual basis of a claim in state court so as to bar an evidentiary hearing under 28 U.S.C. § 2254(e)(2) unless there is a lack of diligence or some greater fault attributable to the petitioner. In Ohio, a state court petitioner has no civil or criminal discovery mechanisms for factual development, even for a claim for which the state controls the proof. *State ex rel. Love v. County Prosecutor's Office*, 718 N.E.2d 426, 427-28 (Ohio 1999).

Material obtained by public record requests pursuant to Ohio Revised Code 149.43, including Petitioner's Exhibits B, C, D, and E, are prohibited by law from being submitted in a post-conviction proceeding. *State ex rel.*

Sevayeta v. Reis, 727 N.E.2d 910, 911-12 (Ohio 2000). The Sixth Circuit found that Petitioner could not satisfy the actual innocence exception to § 2254(e)(2). App. 7. But the Sixth Circuit did not dispute that Petitioner's exhibits cannot be used under Ohio law to support a state post-conviction petition because they were obtained through Ohio's Public Records Act. Moreover, neither Respondent nor the district court disputed this. There simply can be no lack of diligence on the part of a petitioner under § 2254(e)(2) where state law bars the introduction of the very evidence Petitioner introduces in the federal court to necessitate an evidentiary hearing.

Petitioner provided an affidavit in support of his state court petition, and he requested an evidentiary hearing and the appointment of counsel. Ex. 46 & I. Nonetheless, Petitioner's diligent good faith efforts to navigate between Scylla and Charybdis were thwarted by the Catch-22 wall the Ohio courts have erected to insulate state criminal convictions from the truth about police records as well as from the federal Constitution. *Barton v. United States*, 375 U.S. 52, 54 (1963) (no adequate remedy when state rules act as "snarls or obstacles [and] preclude an effective remedy against unconstitutional convictions.") The state post-conviction court dismissed Petitioner's petition *sua sponte*, sans due process notice and opportunity to amend, without holding an evidentiary hearing, thereby aborting the adversarial process and, ultimately, insulating the state from having to admit Petitioner's *Brady* and use-of-false-testimony claims (which Respondent has never denied in any court). Ex. 47-57. Instead, Respondent and the state courts left Petitioner to spend five years excavating public records from his prison cell through dozens of requests to recalcitrant police records custodians to be able to prove his *Brady* and use-of-false-testimony claims. Petitioner has been more than diligent in his efforts to create the necessary record to establish that he is entitled to a new trial. Yet, there is no state court procedure under Ohio law for developing the factual record necessary for meaningful resolution of Petitioner's *Brady* and use-of-false-testimony claims on their merits. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (federal factual development warranted if no state avenue open to develop facts); *Ex Parte Hawk*, 321 U.S. 114, 116, 118 (1944) (federal fact development required because "the remedy afforded by state law proves in practice unavailable or seriously inadequate"); *Moore v. Dempsey*, 261 U.S. 86, 92 (1923) (state "corrective process afforded" not "sufficient to allow a federal judge of the United States to escape the duty of examining the facts for himself"); *Coss v. Lackawana County Dist. Atty.*, 204 F.3d 453, 460 & n. 8 (3rd Cir. 2000) (*en banc*) (where "state law clearly forecloses state court review . . . District Court properly excuse[s] exhaustion and entertain[s] . . . claim on its merit"). The inadequacy of the state court record is attributable to the absence of a state corrective procedure in which Petitioner's Exhibits B, C, D, and E, are admissible into evidence and attributable to Respondent's ongoing suppression, falsification, and obstruction of evidence, including Petitioner's Exhibits B, C, D, and E, crucial to impeachment of the Complainant and, thus, crucial to Petitioner's defense at trial. Ex. G & P. *Strickler v. Green*, 527 U.S. 263, 285 (1999); *Dobbs v. Zant*, 506 U.S. 357, 358-59 (1993) (*per curiam*).

Petitioner provided definitive proof of his *Brady* and use-of-false-testimony claims in the district court, Exhibits B, C, D, and E, the very police records about which the police expert testified falsely to avoid an acquittal. Moreover, Petitioner made specific factual claims in diligently attempting to further develop the record. *See* Motions for Leave to Conduct Discovery R. 36 C.A. App. 1235-37, R. 48 pp. 4-9, R. 64 pp. 6-7, 10-15, 24; Petitioner's Verified Facts and Pre-Hearing Brief, R. 55 C.A. App. 1312-13, 1449-50; Motion for Reconsideration, R. 65 pp. 5-11. There was more than ample "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 349 U.S. 286, 299 (1969)). Ultimately, because Petitioner has already set forth facts which, if true, entitle Petitioner to relief, the district court erred in not holding an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293, 313-19, 322 (1963). Petitioner's Verified Facts and Pre-Hearing Brief, R. 55 C.A. App. 1314-16, 1322-23; Motion to Expand the Record, R. 37 C.A. App. 1256-60, R. 60 pp. 9-14; Motion for Leave to Conduct Discovery, R. 48, pp. 8-11, R. 64 pp. 12-15.

If Ohio chooses not to provide a meaningful remedy for a class of claims such as those to be proved by evidence obtained through request for public records, this Court cannot force a state to provide a meaningful remedy for federal claims. But, in so choosing, Ohio forfeits any presumption under the doctrines of federalism and comity that state courts are as willing and as able to vindicate violations of federal rights as are Article III courts. Ohio may make the illogical choice to bar evidence obtained through request for public records from introduction in a post-conviction case. But if Ohio can be allowed in the same stroke to deprive Petitioner of an evidentiary hearing in federal court, then many state court convictions will be forever deprived of meaningful and fair review.

IV

The state appellate court made a finding of fact while reversing Petitioner's first conviction that the state's case turned on the credibility of the Complainant's story. *Zerla I*, 5-6. This finding remained the unchallenged law of the case through no less than ten subsequent state court proceedings. There is no support in the record for the Sixth Circuit's *sua sponte* determination that the complainant's testimony was corroborated by the several witnesses and the records of her injuries.

Respondent has never challenged this finding of the Ohio Court of Appeals. Had he done so, Petitioner could have responded in his reply brief in the Sixth Circuit. The trial records show that the state court's finding is simply not rebuttable by clear and convincing evidence. *Id.*, 6-8.

It is well established that a presumption of correctness attaches to findings of fact made by a state appellate court. *Sumner v. Mata*, 449 U.S. 539, 547 (1981).

A presumption of correctness applies to fact-findings adverse to the state as well as those adverse to a petitioner. *Burden v. Zant*, 498 U.S. 433, 436 (1991). Unless the presumption of correctness under 28 U.S.C. § 2254(e)(1) is substantially different from that under former 28 U.S.C. § 2254(d), the decision of the Sixth Circuit below is in conflict with *Burden*, *Sumner*, and *Barker*. In the alternative, this Court needs to address whether these authorities still control under § 2254(e)(1).

Furthermore, the Sixth Circuit erroneously denied relief on Petitioner's *Brady* and use-of-false-testimony claims. The Sixth Circuit also applied a heightened materiality standard requiring that suppressed evidence and false testimony "probably would have changed the result of the trial." App. 6. Thus, the Sixth Circuit decision below is in conflict with *United States v. Bagley*, 473 U.S. 667, 682 (1985), which requires only a "reasonable probability" of a different outcome and with *United States v. Agurs*, 427 U.S. 97, 103-04 (1976), which requires only "any reasonable likelihood that the false testimony effected the judgment of the jury." These important questions regarding the materiality of the suppressed police records and false testimony about them should be addressed by this Court.

V

On the question of whether false and misleading testimony from police witnesses is imputed to the prosecuting attorney, the Sixth Circuit's decision is in direct conflict with *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995), and *United States v. Agurs*, *supra*, at 103-04 (1976). In denying Petitioner's *Brady* and use-of-false-testimony claims, the Sixth Circuit found that "there was no indication that the [police expert] witness would have th[e] information" contained in the suppressed police records. App. 5. The case relied upon by the Sixth Circuit, *United States v. Hawkins*, 969 F.2d 169, 175 (6th Cir. 1992), simply did not involve testimony about police records given by a police witness. The jury was led to believe that the police expert witness had certain knowledge of other police investigations to the expert's testimony bolstering the credibility of the Complainant's story. The prosecutor deliberately led the jury to believe this because otherwise the jury would have been able to disregard the police expert's testimony if it were not constrained to the relevant conditions for the recovery of sperm under the highly atypical fact-pattern alleged. Even if the police expert did not know the true content of the suppressed police records about those other cases she testified about but merely gave the answer necessary to avoid an acquittal, that is precisely the problem! If she did not know, that would have been the only truthful answer. What the jury heard was an answer that is shown to be factually false and misleading by those very police records. Knowledge of police records is imputed to the prosecutorial team and to the prosecutor himself. *Kyles v. Whitley*, 514 U.S., at 437-38. The Sixth Circuit erred in denying relief on Petitioner's *Brady* and use-of-false-testimony claims. Again, Respondent has never denied any element of Petitioner's *Brady* and use-of-false-testimony claims. This is an important and all too recurring issue. Can a police witness give testimony later shown to be false by police records then claim not to have known it was false? The Court should take this opportunity to provide explicit guidance on this issue.

VI

Petitioner relied on pre-AEDPA law in delaying the filing of his petition containing exhausted claims to pursue factual development of non-exhausted claims. The results are his many exhibits supplementing this record.

Petitioner exhausted grounds 1, 2, 3, 5, and part of ground 6 of his petition in 1995. He would have preferred to litigate these exhausted claims in piecemeal fashion prior to the enactment of AEDPA, but did not do so solely because of his reliance upon his right, as it then existed, to an evidentiary hearing and to *de novo* review of mixed questions of fact and law in the preferred single *habeas* petition. C.A. App. 1325-30.

Had Petitioner known that 28 U.S.C. § 2254 would change adversely to his interests, he would have filed a piecemeal petition prior to April 23, 1996. His restraint upon comprehending the perils of the abuse of the writ doctrine was an exercise of considerable discipline. Depriving litigants of the comfort of being able to rely on established law can only encourage piecemeal decision-making. Had Petitioner filed an unsuccessful petition prior to 1996, the new 28 U.S.C. § 2244(b)(2)(B) would turn out not to bar a second petition which satisfies prior standards for the avoidance of dismissal for abuse of the writ. *In re Hanserd*, 123 F.3d 922, 931-34 (6th Cir. 1997). That he made the opposite strategic decision does not change the fact that he relied to his detriment on prior law.

The Sixth Circuit rejected this argument without analysis simply asserting that "it is well-established that the [AEDPA] applies to petitions filed after its effective date. *Barker v. Yunkins*, *supra*, at 871 (6th Cir. 1999)." App. 6. But while the petitioner in *Barker* had exhausted claims prior to the effective date of AEDPA, he could attribute his failure to file prior to AEDPA to a conscious strategic decision in reliance on the preference under prior law for single petitions. Thus, *Barker* does not address Petitioner's claim of substantial reliance and neither did the Sixth Circuit below.

This Court has characterized AEDPA's revisions of prior law to change standards of proof and persuasion in a way more favorable to the state as going beyond mere procedure to affect substantive entitlement to relief. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). The loss of a substantive entitlement to relief from exhausting other claims is the ultimate new legal consequence. This case presents the important question of whether a litigant can rely upon the law in effect when strategic litigation decisions are made.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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No. 00-4510

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TERRANCE EDWARD ZERLA,	)	
Petitioner-Appellant,	)	**ORDER**
v.	)	(Filed Apr. 25, 2002)
MICHAEL A. LEONARD,	)	
Respondent-Appellee.	)	

Before DAUGHTREY and MOORE, Circuit Judges; SIMPSON, District Judge.[*]

Terrance Edward Zerla, an Ohio state prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

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[*] The Honorable Charles R. Simpson III, United States District Judge for the Western District of Kentucky, sitting by designation.

Zerla was convicted by a jury, on retrial, of kidnapping and three counts of rape. He was sentenced to thirty to seventy-five years of imprisonment. The Ohio Court of Appeals affirmed the denial of a motion to dismiss on speedy trial grounds, and affirmed Zerla's conviction on direct appeal. His motion for reopening was denied, and his post-conviction action was unsuccessful. He then filed this petition for federal habeas corpus relief, raising seven issues. The district court denied the petition, addressing five of the claims on the merits, finding one procedurally defaulted, and dismissing one as unrelated to the conviction. A certificate of appealability was issued as to the five claims which were addressed on the merits. Zerla has briefed those claims, and also argues that the Antiterrorism and Effective Death Penalty Act should not have been applied to his petition, and that the district court should have appointed counsel and conducted an evidentiary hearing. He has also filed motions for the appointment of counsel, for release pending appeal, and for other miscellaneous relief.

The evidence at Zerla's trial showed that Zerla accosted his victim, placed his fingers in her mouth, pulling her chin down to her chest, and pulled her into an alleyway where he threatened to kill her and forced her to engage in oral, anal, and vaginal sex. Residents of a neighboring building heard the victim's cries and saw her being forced into the alley. They came out and interrupted the crime. One of the witnesses chased Zerla down and held him until the police arrived, while the others took the distraught victim into their apartment to wait for the police. Hospital records noted the unusual bruising under the victim's tongue caused by Zerla's fingers, and abrasions on her back. No sperm were identified from the swabs taken.

Zerla argues that he is entitled to habeas corpus relief because he was denied the right to a public trial. However, this was not a case where the trial court exercised its discretion to close the trial to the press and public. *Cf. Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596, 609 (1982). Rather, Zerla is complaining because one child was removed from the courtroom pursuant to the trial judge's policy of excluding small children from rape trials. There is no evidence of an abuse of discretion by the trial court, and no plausible argument that Zerla was denied a fair trial by this action.

Zerla next argues that his constitutional rights were violated when the state court held that a state law on speedy trials did not apply to his retrial. Federal habeas corpus relief is not available on the basis of alleged violations of state law, but is confined to arguments raising violations of the Constitution. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). Zerla attempts to argue that this is not a state law issue, but instead a double jeopardy claim. No such claim was certified for appeal, and would be meritless in any event. *See United States v. Scott,* 437 U.S. 82, 90-91 (1978).

Zerla's speedy trial claim was properly raised as a federal issue in his third claim for relief. The record shows that Zerla's initial conviction was reversed due to juror bias on March 21, 1992. The Ohio Supreme Court affirmed that decision on July 15, 1992. Zerla's retrial commenced on August 9, 1993. Zerla claims that the delay was due to the state appointing inappropriate counsel to represent him. In August, 1992, a former prosecutor was appointed. In November, 1992, the law school roommate of the prosecuting attorney was appointed. Zerla changed counsel several times. He was released on bond in November, 1992. Subsequent to his release, one extension of seven days was requested by the prosecutor. The remaining extensions were all requested by defense counsel. In analyzing a speedy trial claim, the relevant issues are the length of the delay, the reasons for the delay, the defendant's assertion of his rights, and any prejudice to the defense. *Doggett v. United States,* 505 U.S. 647, 651 (1992). In this case, the length of the delay was slightly longer than one year. Zerla has not shown that any of the reasons for delay were illegitimate. Although he claims to have asserted his rights on numerous occasions, the only formal motion for dismissal on this ground was made on the second day of trial. Finally, he has pointed to no prejudice. On the contrary, as Zerla was released on bond, the delays were to his benefit. This claim is therefore meritless.

Zerla next claims that his right to remain silent following *Miranda* warnings was held against him in violation of *Doyle v. Ohio,* 426 U.S. 610, 619 (1976). Review of the record shows that Zerla is actually objecting to the prosecutor's argument to the jury that Zerla had pursued a mandamus action requesting the state's records between his two trials, and was therefore able to tailor his testimony based on the information obtained. The Supreme Court has declined to extend *Doyle* to comments on a defendant's ability to tailor his testimony to that of earlier witnesses. *Portuondo v. Agard,* 529 U.S. 61, 74-75 (2000).

Zerla's final claim includes arguments that the prosecutor presented perjured testimony and withheld exculpatory evidence, while his expert testimony was erroneously excluded. The pathologist who found the swabs from the rape kit negative for sperm in this case testified that she had rarely received positive results from oral swabs in her lengthy career, estimating that she saw positive results approximately once per year. Since his conviction, Zerla has succeeded in obtaining a record of the witness's lab reports spanning more than a decade, as well as the corresponding police records of these cases, and now claims that such records show that the witness obtained positive test results from an oral swab in three or four cases where the facts were similar to this case, that is, where the swabs were performed within a few hours of alleged ejaculation in the oral cavity. In order to demonstrate prosecutorial misconduct on the basis of perjured testimony, it must be shown that false evidence was presented, that the prosecution knew the evidence was false, and that the evidence was material to the verdict. *United States v. Hawkins,* 969 F.2d 169, 175 (6th Cir. 1992). Zerla has failed to meet any of these requirements. If anything, the records indicate that the witness may have overstated how often she receives positive results from oral swabs. There is no indication that the witness knew her testimony was "false", or that the prosecutor was aware of perjury. While Zerla claims to know which of the cases involved ejaculation, there is no indication that the witness would have this information. Finally, this evidence was not material. Although Zerla argues that the evidence was crucial to the victim's credibility, in fact, her testimony was corroborated by the several witnesses and the records of her injuries. Ejaculation did not need to be shown to establish penetration.

Zerla also argues that the prosecutor should have supplied him with every lab report the witness had ever performed, and the corresponding police records, so that his counsel could have effectively cross-examined the witness. In order to state a claim of prosecutorial misconduct based on withholding exculpatory evidence, it must be shown that material evidence was withheld which probably would have changed the result of the trial. *Pennsylvania v. Ritchie,* 480 U.S. 39, 57 (1987). As discussed above, this evidence was not material. Nor would a different verdict have possibly resulted from questioning this witness about the alleged facts of cases which she was not informed of prior to performing testing.

The final facet of Zerla's argument is that his expert was improperly restricted from testifying about an experiment she had performed during the trial which showed that sperm could be detected from swabs of the oral cavity up to three hours following ejaculation. The evidence was excluded as a discovery sanction and because it was found that its prejudicial value outweighed its relevance. Evidentiary rulings can be the basis of federal habeas corpus relief only where they denied the defendant a fundamentally fair trial. *Clemmons v. Sowders,* 34 F.3d 352, 357-58 (6th Cir. 1994). Zerla was not denied a fair trial by the exclusion of testimony regarding this experiment. His expert was allowed to testify regarding a published study which showed positive results were possible from oral swabs up to six hours after a rape, and was permitted to give her opinion that the negative results in this case indicated that no ejaculation had taken place.

The additional arguments raised in Zerla's brief are without merit. Contrary to his argument, it is well-established that the Antiterrorism and Effective Death Penalty Act applies to petitions filed after its effective date. *Barker v. Yukins,* 199 F.3d 867, 871 (6th Cir. 1999).

The district court correctly found that no evidentiary hearing should be held, as the facts underlying Zerla's claims are not such that no reasonable factfinder would have found him guilty. 28 U.S.C. § 2254(e)(2). Finally, the appointment of counsel is not necessary in cases in which only frivolous claims are presented. *Abdullah v. Norris,* 18 F.3d 571, 573 (8th Cir. 1994).

For all of the above reasons, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit. All pending motions are denied.

ENTERED BY ORDER
OF THE COURT

/s/ [Illegible]
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TERRANCE EDWARD
ZERLA,

Petitioner,

v.

GARY MOHR, Warden,

Respondent.

Case No. C-2-98-1111
JUDGE GRAHAM
Magistrate Judge ABEL

OPINION AND ORDER

(Filed Sep. 21, 2000)

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is before the court on the instant petition, respondent's return of writ And the exhibits of the parties.

Petitioner was indicted by the September 1990 term of the Franklin County grand jury on one count of kidnapping, in violation of O.R.C. §2905.01, and on three counts of rape, in violation of O.R.C. §2907.02. Exhibit A to Return of Writ. While represented by counsel, petitioner proceeded to jury trial, and on August 19, 1993, petitioner was found guilty of all charges. *State v. Zerla*, No. 90CR-09-4398 (Franklin Co. Com. Pleas 1993), Exhibit 2 to Return of Writ. Petitioner was sentenced to four terms of ten to twenty-five years incarceration, to run consecutively to each other. *Id.* Represented by new appellate counsel, petitioner filed a timely appeal of his conviction to the Tenth District Court of Appeals. Exhibit 3 to Return of Writ. He asserted the following claims, repeated here *verbatim*:

1. The trial court erred in excluding two persons from the courtroom without a hearing on the matter. Such error denied appellant his right to a public trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article One of the Ohio Constitution.

2. The trial court erred in excluding the defense witness expert testimony. Such exclusion acted to deny the appellant the right to present a defense as guaranteed by the United States and Ohio Constitutions.

A. The trial court erred in finding the defense intentionally withheld the test results of Dr. Karl and that defense counsel violated the discovery rules.

B. The trial court erred in imposing the most severe sanction provided for in Crim. R. 16(E).

3. Appellant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article One of the Ohio Constitution.

4. The trial court erred in admitting testimony regarding appellant's successful *pro se* public records mandamus action and erred in admitting appellant's prior testimony as prior inconsistent statements when such evidence was highly prejudicial, had no probative value and served to penalize the appellant for exercising his rights.

Exhibit 4 to Return of Writ. On December 22, 1994, the appellate court affirmed the judgment of the trial court, but remanded the case to the trial court to clarify the judgment to reflect consecutive sentences with respect to only the three rape counts. *State v. Zerla*, No. 93APA09-1304 (Franklin Co. App. Ct. 1994), Exhibit 7 to Return of Writ. Still represented by appellate counsel, petitioner filed an appeal to the Ohio Supreme court. Exhibit 8 to Return of Writ. He asserted the following propositions of law, repeated here *verbatim*:

> 1. Although a trial court has the right to control its courtroom, today's public mores involving a more realistic attitude toward matters of sex precludes a trial court's determination that young people may reasonably be excluded from the trial of a sexual offense.
>
> 2. Evidence of experiments performed out of court, tending to prove or disprove a contention in issue, is admissible if there is a substantial similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute. The fact that there are some dissimilarities goes to the weight to be given the experiment. (*St. Paul Fire & Marine Ins. Co. v. Baltimore & Ohio R.R. Co.* (1935), 129 Ohio St. 401, first paragraph of the syllabus, reaffirmed and explained.)

Id. the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question on April 26, 1995. Exhibit 10 to Return of Writ. Proceeding *pro se*, petitioner also filed a motion for delayed reconsideration and a motion for reopening of his appeal pursuant to Ohio Appellate Rule 26(B) on March 23, 1995. Exhibits 11 and 12 to Return of Writ. Petitioner's motion for leave to file a motion for delayed reconsideration was granted by the appellate court. Exhibit 14 to Return of Writ. Petitioner asserted the following assignments of error:

> 1. Appellate counsel should have argued that the out-of-court experiment conducted by defendant's expert was admissible to rebut the testimony of the state's expert witness.
>
> 2. Appellate counsel should have argued that it was plain error for the trial court to admit statements from the state's expert witness regarding her experience in detecting seminal fluid or sperm in oral rape cases.

See Exhibit 19 to Return of Writ. On June 30, 1995, the appellate court denied petitioner's motion. *Id.*[1] Still proceeding *pro se*, petitioner filed an appeal of the appellate court's decision to the Ohio Supreme Court. He asserted the following propositions of law, repeated here *verbatim*:

> 1. Appellate counsel was ineffective for failing to raise assignments of error meriting reversal. State and federal Constitutions guarantee effective assistance of appellate counsel.
>
> 2. The state's expert testimony lacked foundation and scientific validity. It mislead the jury and opened the door to out-of-court tests conducted by defense expert. *State v. Williams* (1983), 4 Ohio St.3d 53, syllabus, applied.
>
> 3. Out-of-court tests conducted by defense expert which control for all of the conditions relevant to occurrence reflected in the hypotheticals presented by the state to its expert witnesses, is shown thereby to be substantially similar and to

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[1] Petitioner filed two motions for reconsideration with the appellate court, which were denied. Exhibits 20, 21, 22, 23, 25 and 26 to Return of Writ.

> have probative value not substantially outweighed by risk of unfair prejudice, and thus to be admissible as reconstruction, or, as demonstrating principle, 100% correlation between conditions reflected in said hypothetical and recovery of spermatozoa, as basis for defense expert's opinion contradicting state's expert testimony based upon comparative analysis to state expert's experiential data base of empirical test results which were not controlled for any of the conditions reflected in said hypothetical, thus leaving the defense tests as the only empirical evidence addressing recovery of sperm under said conditions. *St. Paul Fire & Marine Ins. Co. v. Baltimore & Ohio R.R. Co.* (1935), 129 Ohio St. 401, first paragraph of the syllabus, and Evid.R. 403(A), construed with Evid.R. 703, applied.

Exhibit 27 to Return of Writ. The Ohio Supreme Court affirmed the judgment of the appellate court on February 7, 1996. *State v. Zerla*, No. 95-1687 (Ohio S.Ct. 1996), Exhibit 30 to Return of Writ.[2]

B. POST CONVICTION ACTIONS

Petitioner also initiated several *pro se* post conviction actions. He filed a motion to dismiss for lack of speedy trial with the trial court on August 13, 1993, which was denied by the trial court on August 18, 1993. Exhibit 31 to

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[2] The Ohio Supreme Court noted that petitioner's first conviction on kidnapping and three counts of rape was set aside by the court of appeals on March 17, 1992. Thus, this was petitioner's second jury trial and second conviction on these charges. Exhibit 30 to Return of Writ.

Return of Writ.[3] Petitioner filed an appeal of the trial court's decision, which was denied on December 22, 1994. Exhibits 35 and 38 to Return of Writ. The Ohio Supreme Court denied leave to appeal and dismissed petitioner's appeal on April 15, 1995. Exhibit 42 to Return of Writ. Petitioner also filed a Petition to Vacate or Set Aside Sentence with the trial court on September 23, 1996. Exhibit 46 to Return of Writ. The petition was dismissed by the trial court on October 10, 1996. Exhibit 47 to Return of Writ. Petitioner filed an appeal of the trial court's decision to the Tenth District Court of Appeals. He asserted the following claims:

> 1. The trial court erred in dismissing appellant's petition without issuing findings of fact and conclusions of law in violation of appellant's rights to due process and equal protection under state and federal constitutions.
>
> 2. The trial court erred in dismissing appellant's petition on its own motion without providing notice to appellant of the court's intent to do so and without providing opportunity for appellant to amend purported deficiencies in his petition in violation of his rights to due process and equal protection under state and federal constitutions.
>
> 3. The trial court erred in dismissing appellant's petition for failing to state a claim upon

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[3] Petitioner filed a motion for delayed reconsideration/reconsideration instanter and/or motion for delayed new trial/new trial instanter with the trial court, which was denied on March 21, 1994. Exhibits 32 and 34 to Return of Writ.

which relief can be granted in violation of appellant's rights to due process and equal protection under state and federal constitutions.

4. The trial court erred in dismissing appellant's petition without holding an evidentiary hearing in violation of appellant's rights to due process and equal protection under state and federal constitutions.

5. The trial court erred in requiring appellant to meet an unconstitutionally heightened "proof-pleading" pleading burden in requiring appellant to prove claims of prosecutorial misconduct in his pleadings, and in insulating the state from having to answer by dismissing petition sue sponte, when the proof of these claims is by definition within the control of the state and not within the control of appellant in violation of appellant's rights to due process and equal protection under state and federal constitutions.

6. As applied to appellant's claims of prosecutorial misconduct involving suppression of evidence material to the defense and use of demonstratively false evidence, proof of which is by definition within the control of the state and not within control of appellant, the retroactive imposition of a one-year statute of limitations violates due process, equal protection, and ex post facto clauses of state and federal constitutions.

Exhibit 48 to Return of Writ. On September 25, 1997, the Tenth District Court of Appeals affirmed the judgment of the trial court. Exhibit 51 to Return of Writ. Petitioner filed an appeal of the appellate court's decision to the Ohio Supreme court, Exhibit 52 to Return of Writ. On January 28, 1998, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeals as not involving any substantial constitutional question. Exhibit 54 to Return of Writ.

Petitioner filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, *pro se*, on November 4, 1998. He alleges that he is in the custody of the respondent in violation of the Constitution of the United States based upon the following grounds:

> 1. Denial of right to public trial.
>
> The trial court removed people from the courtroom without a prior hearing and without making any findings of fact to support any compelling necessity for this action.
>
> 2. Denial of due process, equal protection and effective assistance of counsel, and violation of protection against double jeopardy by Ohio's speedy trial statute, R.C. 2945.71, as applied to defendant on retrial.
>
> 3. Denial of right to speedy trial.
>
> 4. Denial of effective assistance of counsel.
>
> Defense trial counsel was ineffective for dragging out before the jury in protracted and futile cross-examination of Detective Straight that defendant exercised his right to remain silent.
>
> 5. Conviction obtained by penalizing defendant for post-arrest silence and his exercise of other constitutional and statutory rights and privileges and for the estate's application of its own procedural rules.

6. Denial of right to present defense evidence.

> Suppression of material evidence favorable to the defense in the possession of the state, the presentation of false expert testimony that the suppressed evidence supported the state's theory of the case, and the exploitation thereof to obtain the exclusion of defense expert testimony which was, in fact, consistent with what the suppressed evidence actually shows, and which was the next best alternative means of proof, amounted to prosecutorial misconduct and independent due process violations, infringed upon the rights to confront, to compulsory process, to the effective assistance of counsel, and to trial by jury, denying petitioner the right to present a defense and the right to a fair trial.

It is the position of the respondent that petitioner's claims are without merit. Respondent also argues that petitioner has committed a procedural default as to his fourth claim for relief.

I. PROCEDURAL DEFAULT

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). If, because of a procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner is required to demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.* This "cause and prejudice" analysis also applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985).

A.

First, this Court must determine whether there are any state procedural rules applicable to petitioner's claims, and if so, whether petitioner violated the rule(s).

In petitioner's fourth claim for relief, he asserts the ineffective assistance of trial counsel due to cross-examination of Detective Straight regarding the fact that petitioner had exercised his right to remain silent. This claim, being readily apparent from the face of the record, should have been raised on direct appeal, but was not. Any attempt to raise the claim now would be barred under Ohio's doctrine of *res judicata. See State v. Cole*, 2 Ohio St.3d 112 (1982); *State v. Ishmail*, 67 Ohio St.2d 16 (1981); *State v. Perry*, 10 Ohio St.2d 175 (1967).

B.

Next, this Court must determine whether or not the state relied upon this procedural rule to dispose of the claim. Consideration of petitioner's claim is barred by virtue of petitioner's failure to present this claim to any state court. The state courts were therefore never given an opportunity to enforce the procedural rule due to the nature of petitioner's procedural default. This Court deems the second part of the *Maupin* test to have been satisfied.

C.

Third, it is for the court to decide whether the procedural rules at issue constitute an adequate and independent bases upon which to foreclose review of the petitioner's federal constitutional claims. This task requires the Court to balance the state's interests behind each procedural rule against the federal interest in reviewing federal claims. *See Maupin v. Smith*, 785 F.2d at 138.

Under this analysis, the procedural rules barring petitioner's claims for relief constitute adequate and independent state grounds for denying relief. The state courts must be given a full and fair opportunity to remedy alleged constitutional defects. The requirement that all available claims be asserted in the first appeal serves the state's interests in finality and in ensuring that claims are adjudicated at the earliest possible opportunity. Finally, the doctrine of *res judicata* is stated in unmistakable terms in numerous Ohio decisions and Ohio courts have consistently refused to review claims on the merits under the doctrine. *See State v. Cole, supra*; *State v. Ishmail, supra*; *State v. Perry, supra*.

D.

The court concludes that petitioner waived his right to present his fourth claim for federal habeas review. Petitioner can still secure review of his claim on the merits if he demonstrates cause for his failure to follow the state procedural rules, as well as actual prejudice from the constitutional violations that he alleges.

The ineffective assistance of counsel can be asserted as cause for a procedurally defaulted claim:

> Although we have not identified with precision exactly what constitutes "cause" to excuse a procedural default, we have acknowledged that in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice. *Carrier*, 477 U.S., at

> 488-489. Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. *Ibid.*

Edwards v. Carpenter, 120 S.Ct. 1587 (2000). However, the ineffective assistance of counsel claim must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id.*, citing *Carrier, supra*, at 480. Further, the Supreme Court held that if a petitioner has procedurally defaulted the claim he asserts as cause, that claim cannot satisfy the cause requirement unless he can satisfy the cause and prejudice standard with respect to that claim:

> To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that the procedural default may not itself be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to that claim.

Id.

The Court presumes that petitioner asserts the ineffective assistance of appellate counsel as cause for his procedural default. However, this claim was never presented to the state courts, and any attempt to do so now would be barred under Ohio's doctrine of *res judicata*, since a motion for reopening of petitioner's appeal was already considered, and denied by the appellate court. Exhibit 19 to Return of Writ.

Petitioner has failed to demonstrate either cause for his procedural default or actual prejudice resulting from the alleged constitutional violation.

E.

Beyond the four-part *Maupin* analysis, this Court is required to consider whether this is "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. at 491; *see also Sawyer v. Whitley*, 505 U.S. 333. After review of the record, the Court does not deem this to be such a case.

II. CLAIM ONE

In his first claim for relief, petitioner asserts that he was denied his right to a public trial, because the trial court unconstitutionally removed people from the court. The Tenth District Court of Appeals made the following findings regarding petitioner's claim:

> . . . [D]efendant contends that the trial court erred in excluding two persons from the courtroom without a hearing on the matter, which denied him his right to a public trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. . . .
>
> Defendant filed a "Motion to Dismiss/Motion for Mistrial" based upon the trial court's exclusion of two people from the courtroom during the trial. Attached to the motion was an affidavit from a woman who stated that she and her daughter were in the courtroom for approximately five minutes when a person approached her and told her to leave because the testimony was not proper for a young child. An hour later, she was informed by the same person that the judge's policy was to exclude children under the age of twelve from certain types of testimony, and she was told not to bring her daughter to closing

arguments the following day. See Penrod affidavit, Aug. 17, 1993. At a sidebar conference, the motion was discussed and the conversation developed as follows, beginning with the trial court stating:

> "While we are back here I am going to rule on this motion to dismiss. It is my policy not to have small children sit in a courtroom, particularly in a case like this where we have some very graphic sexual testimony. I have in no way excluded the mother. She was permitted to return and hear any part of the trial she wishes to do so.
>
> "I stand on my position. I have a right to control that issue when it comes to small children which I think is a very serious issue, and therefore I am going to overrule this motion to dismiss – the motion for mistrial. Mother is perfectly free to go.
>
> "MR. DAY: As a practical effect the child is with the mother.
>
> "THE COURT: She is perfectly free to come this morning.
>
> "MR. DAY: She is here today, She was concluded [sic] yesterday. If I understand we won't need hearing, if the court's ruling is not based on any inaccuracy or false claim in the rationale for the motion at which time they were to leave the courtroom.
>
> "THE COURT: Oh no, that is my policy. I don't allow – I will freely admit I

> have instructed small child to be removed from the courtroom. I do not think it is appropriate for the child to hear about fellatio intercourse. It is my policy, until told otherwise by a higher court.
>
> "MR. DAY: Fine with me. (Tr. Vol. V, pp. 1059-1060.)

Defendant's contention is that the court erred in excluding the two persons and also that the court should have held a hearing on the matter.

The right to a public trial is a fundamental right guaranteed by both the United States and Ohio Constitutions. *State, ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 420, quoting *State v. Lane* (1979), 60 Ohio St.2d 112, 199. *In re Oliver* (1948), 333 U.S. 257, 68 S.Ct. 499. The Supreme Court of Ohio has described this right as "[t]he guarantee of a public trial is a cornerstone of our democracy which should not be circumvented unless there are extreme overriding circumstances." *See Lane, supra*, at 119. However, this right is not unlimited. As the Supreme Court has stated in *State v. Hensley* (1906), 75 Ohio St.255, 263-264:

> " * * * 'It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst

> character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.'" *Hensley*, quoting Cooley, Constitutional Limitations, 6th Ed., 379; (emphasis sic.)

The trial court does have the power to make reasonable exclusions based upon a proper rationale, including the exclusion of small children from the courtroom during testimony inappropriate for them to hear. See Annotation, Validity and Construction of Constitution or Statute Authorizing Exclusion of Public in Sex Offense Cases (19710, 39 A.L.R.3d 852. For example, in *Hensley*, a defendant was charged and convicted of the crime of "unlawfully having intercourse with one L.H., a female person under the age of sixteen years." The trial court excluded everyone except the jury, defendant's counsel, members of the bar, newspaper men and defendant's witness. The Supreme court held that the general exclusion was too broad and exceeds the power of the trial court because it denied defendant his constitutional right to a public trial. The Supreme Court did state, however, "[h]ad the court continued its sessions in the general court room [rather than a small, probate courtroom], and had the order excluded all youths, and allowed free entrance to the court room by others, probably no valid exception to the order could have been taken." *Hensley, supra,* at 265.

In this case, the trial court excluded only a child from the courtroom since the testimony involved "graphic sexual testimony." Excluding one child, under these circumstances, did not deny defendant his right to a public trial, even though of necessity the child's mother also could not be present.

Defendant also contends that the exclusion should not have occurred without a hearing and cites *State ex rel. Dispatch Printing Co. v. Lias* (1994), 68 Ohio St.3d 497, in support of his argument. The first paragraph of the syllabus of *Dispatch Printing Co.* provides as follows:

> "Unless summarily denied, a motion of a party to a juvenile court proceeding (proceeding) requesting that the proceeding be closed to the press and public, requires the juvenile court to conduct an evidentiary hearing (closure hearing) to determine whether closure of the proceeding is warranted. Closure of the proceeding may be warranted upon a showing by the juvenile court

> that it has followed the standards set forth in *In re T.R.* (1990), 52 Ohio St.3d 6, 556 N.E.2d 439, paragraph three of the syllabus, and that there are no reasonable alternatives to closure."

Dispatch Printing Co. is factually different from this case. This case does not involve a proceeding being closed to the press and public but merely to one child. Additionally, in this case, defendant's counsel agreed that a hearing was not necessary. As quoted above, he stated:

> "MR. DAY: She is here today. She was concluded [sic] yesterday. *If I understand we won't need hearing, if the court's ruling is not based on any inaccuracy or false claim in the rationale for the motion at which time they were to leave the courtroom.*
>
> "THE COURT: Oh, no, that is my policy. I don't allow – I will freely admit I have instructed small child to be removed from the courtroom. I do not think it is appropriate for the child to hear about fellatio intercourse. It is my policy, until told otherwise by a higher court.
>
> "MR. DAY: Fine with me." (Tr. Vol. IV, p. 1060; emphasis added.)

Defendant's counsel agreed that a hearing would not be necessary, and defendant cannot now complain that a hearing was not held. Consequently, the first assignment of error is not well-taken.

State v. Zerla, No. 93APA09-1304 (Franklin Co. App. Ct. 1994), Exhibit 7 to Return of Writ. The state court findings in this case are entitled to a presumption of correctness, 28 U.S.C. §2254(d), (e), and upon review of the record, this Court finds no reason to disturb these findings here.

The Sixth Amendment to the United States Constitution guarantees, "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. Amend. VI. "The right to a public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1, 7 (1986). However, as noted by the state appellate court, this right is not absolute. *Waller v. Georgia,* 467 U.S. 39, 44-45 (1984). The Supreme Court stated, in *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 510 (1984):

> [T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Id., at 606-607, 102 S.Ct., at 2620.
>
> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. Again, as noted by the state appellate court, in the instant case only one child was excluded from the court due to the nature of the testimony, and petitioner's trial counsel stated that a hearing would not be needed under these circumstances and that he did not disagree with the trial court's order. Petitioner's first claim for relief is without merit.

II. CLAIMS TWO AND THREE

In his second claim for relief, petitioner asserts that he was denied due process, equal protection, effective assistance of counsel and convicted in violation of the Constitution's prohibition against double jeopardy, due to the application of Ohio's speedy trial statute, §2945.71. Petitioner argues as follows:

> The state extinguished defendant's liberty interest, created by R.C. 2945.71 et seq., based upon a prior jeopardy, leaving him penalized thereby and not treated the same as others standing for trial. The state has counted time as tolled by defendant where the delay was attributable solely to the state's negli[g]ence in appointing counsel directly out of the prosecutor's office encumbered by a severe potential conflict of interest, which the state objected to unless I would sign away my right to conflict-free assistance of counsel. But for the unconstitutional construction of Ohio's speedy trial statute as not applying anew upon remand for trial, and to force defendant to forfeit his right to effective assistance of counsel, defendant had a liberty interest in his immediate release and dismissal of the indictment against him. The claim is not that the state misapplied its statute, but the application violated the Constitution.

See Amended Petition. In his third claim for relief, petitioner asserts that he was denied his constitutional right to a speedy trial due to the state's "negligence" in failing to appoint competent "conflict-free" counsel; he further argues as follows:

> The defendant cannot be forced to choose between the Sixth Amendment right to conflict-free assistance of counsel and the Sixth Amendment right to a speedy trial! If counsel could not represent defendant at trial without defendant's signature, how can a speedy trial waiver be binding under these facts without defendant's signature!

Id. These claims will be considered together here.

The Tenth District Court of Appeals made the following findings regarding petitioner's claim:

> Defendant-appellant, Terrance E. Zerla, filed a *pro se* notice of appeal and raised the following assignment of error:
>
> > "The court erred as a matter of law in holding that the appellant had not been denied a speedy trial; and erred in holding that denial of the statutory right to a speedy trial on 'retrial' did not deny appellant due process, protection from double jeopardy, and equal protection, as guaranteed by state and federal Constitutions. The court erred as a matter of law in granting summary judgment *sua sponte* in favor of the state despite *prima facie* and unrebutted assertions, and erred in denying appellant's motion for reconsideration and new trial."

Defendant was indicted on one count of kidnapping and three counts of rape. A jury trial was held and defendant was found guilty on all counts. Upon appeal, this court reversed the judgment because the trial court failed to excuse for cause a juror who had previously been raped and also because the trial court erred in imposing multiple sentences in violation of R.C. 2941.25. This court remanded the cause for further proceedings. *See State v. Zerla* (Mar. 17, 1992), Franklin App. No. 91AP-562, unreported (1992 Opinions 993).

The defendant was tried again. At the beginning of his second trial, the defendant filed a *pro se* motion to dismiss for lack of a speedy-trial pursuant to R.C. 2945.71. The trial court overruled the motion finding no speedy trial error. Defendant was again found guilty of one count of kidnapping and three counts of rape. . . .

After his conviction, defendant's counsel filed a notice of appeal concerning the merits of his conviction. Subsequently, defendant filed a *pro se* "Motion for Reconsideration/Reconsideration Instanter And/Or, Motion for Delayed New Trial/New Trial Instanter" and a notice of appeal on the same day. The trial court denied the "motion for reconsideration" finding that defendant raised no new issues concerning a speedy trial and that the issues should be addressed to this court. *See Entry,* March 21, 1994. Defendant is appealing the trial court's ruling denying his "motion for reconsideration" and raises a different issue than those raised in the appeal from the conviction filed by his attorney.

* * *

The period of time between trials is the time which is in question. This court's mandate to the common pleas court occurred on March 21, 1992. The case was continued until August 31, 1992, because the state appealed the judgment to the Supreme Court of Ohio. In August 1992, defendant's attorney withdrew, new counsel was appointed, the trial judge recused himself, and defendant's newly appointed counsel withdrew. On August 31, 1992, the trial was continued until November 30, 1992, because new defense counsel needed time to prepare (new counsel had been appointed on August 26, 1992). On October 21, 1992, the trial was continued from October 20, 1992, until December 7, 1992, upon the state's motion because the prosecutor was involved in an aggravated murder trial, even though the case had not been scheduled for October 20, 1992. Defendant was released from jail on bond on November 12, 1992.

On November 25, 1992, defendant's attorney withdrew, and new counsel was appointed. Also on that day, the trial was continued from December 7, 1992, until February 8, 1993, because defendant had requested new counsel, and the new counsel needed time to prepare. On February 1, 1993, the trial was continued from February 8, 1993, until March 15, 1993, upon defense motion because defense counsel had a trial in the United States District Court. On February 19, 1993, defendant's counsel withdrew and new counsel was appointed. On March 12, 1993, the trial was continued from March 15, 1993, until May 24, 1993, because defense counsel needed additional time to read the transcript of the first trial and to prepare. On May 18, 1993, the trial was continued from May 24, 1993, until August

9, 1993 upon defense motion because of a scheduling conflict, and the defense needed additional time to prepare for the retrial. The retrial began on August 9, 1993.

The right to a speedy trial is guaranteed by both the U.S. and the Ohio Constitutions. The Sixth Amendment to the United States Constitution provides that an "accused shall enjoy the right to a public and speedy trial." Additionally, " * * * the availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment." *State v. Broughton* (1991), 62 Ohio St.3d 253, 256, citing *Klopfer v. North Carolina* (1967), 386 U.S. 213, 222-223, and *State v. Singer* (1977), 50 Ohio St.2d 103, 106. *See, also, State v. Adams* (1989), 43 Ohio St.3d 67, 68. Article I, Section 10, of the Ohio Constitution contains a similar provision.

Additionally, a defendant's right to a speedy trial is addressed in R.C. 2945.71, which was enacted as "a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or misdemeanor and shall be strictly enforced by the courts of this state." *State v. Pachay* (1980), 64 Ohio St.2d 218, syllabus. The Supreme Court of Ohio has described the statutory right in *State v. Wentworth* (1978), 54 Ohio St.2d 171, 173, by stating that R.C. 2945.71 through 2945.73:

> " * * * implement the constitutional right of speedy trial and set forth mandates to which strict adherence is required, that the burden to timely try a defendant rests upon the prosecution and trial courts and that a defendant is not

> required to either demand a timely trial or object to a trial setting outside the periods set forth in R.C. 2945.71 and is to be accorded the benefits of time limitations prescribed therein." (Citations omitted.)

The statutory right to a speedy trial is created by R.C. 2945.71(C)(2), which provides as follows:

> "A person against whom a charge of felony is pending:
>
> "* * *
>
> "(2) Shall be brought to trial within two hundred seventy days after his arrest."

However, for purposes of computing time under this section, R.C. 2945.71(E) provides that:

> "For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days."

Defendant contends that, pursuant to R.C. 2945.73(B), he should have been discharged. R.C. 2945.73(B) provides as follows:

> "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."

Thus, upon proper motion, the charges pending against a defendant must be dismissed if he is not brought to trial within the time limitations. However, the time within which the defendant must be brought to trial may be extended for any of the reasons provided in R.C. 2945.72, which provides in pertinent part as follows:

> "The time within which an accused must be brought to trial, or, in the case of a felony, to preliminary hearing and trial, may be extended only by the following:
>
> "* * *
>
> "(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]"

This provision allows the trial court to extend the time within which the defendant must be tried as long as the continuance is reasonable. The General Assembly recognized that some degree of flexibility is necessary in applying the time limits and, therefore, enacted R.C. 2945.72. *State v. Lee* (1976), 48 Ohio St.2d 208; *Wentworth, supra,* at 173. However, the statute is not to be liberally construed. To construe R.C. 2945.72 too broadly would render it "meaningless and thwart the direction of, the speedy- trial statutes. Practices which are used to undercut R.C. 2945.71 and 2945.73 must not be used to extend the requisite time limits." *Lee, supra,* at 209.

However, the statutory provisions do not directly apply to retrials following reversals of convictions but, rather, the standard to be applied for speedy trial for a retrial is a constitutionally reasonable time, and the statutory provisions are merely guidelines to assist in determining reasonableness in those situations. *See State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Saunders* (1984), 23 Ohio App.3d 69, [FN3] This court has previously stated: "Therefore, in determining whether a defendant has been granted a speedy retrial following either a mistrial or the granting of a new trial, a reviewing court should look to, but is not limited to, the statutory definition of what constitutes a reasonable time." *Billups, supra,* at 1088.

FN3. We have previously stated that "*Saunders* merely established that, following the granting of a mistrial upon defendant's motion or a new trial, the time period for bringing defendant to trial commences anew and is not a continuation of the time for initially bringing the accused to trial." *State v. Billups* (Mar. 17, 1992), Franklin App. No. 91AP-306, unreported (1992 Opinions 1084, 1088-1089).

Thus, to the extent R.C. 2945.71 to 2945.73 provide guidelines, the question is whether the continuances were reasonable and necessary in light of the circumstances since a continuance properly extends the statutory speedy-trial requirement only if the trial record affirmatively demonstrates the necessity and reasonableness of that continuance. *Aurora v. Patrick* (1980), 61 Ohio St.2d 107, 109; *State v. Saffell* (1988), 35 Ohio St.3d 90.

In this case, the period of time involved is March 21, 1992, until August 9, 1993. [FN4] This is clearly more than the 270-day statutory definition of reasonableness, but continuances reasonably granted extended the statutory time within which the defendant would have had to be brought to trial. All but two of the continuances were upon defense motions. Even though not all were signed by the defendant, the motions were made by defense counsel. A defendant is bound by his counsel's actions in making reasonable motions for continuances which delay the trial. *Saunders, supra,* at 70, citing *State v. McBreen* (1978), 54 Ohio St.2d 315. *See also, State v. King* (1994), 70 Ohio St.3d 158, 160. Under R.C. 2945.72(H), a continuance based upon a defense motion would be a reasonable extension of the time in which it is reasonable to bring an accused to trial.

FN4. The days between March 21, 1992, and November 12, 1992, would each be counted as three days pursuant to R.C. 2945.71(E) because the defendant was held in jail on this charge. However, most of this period would be excluded by reasonable continuances granted.

Two continuances were upon motions of the state. The trial was continued from March 21, 1992 (the date of this court's mandate), until August 31, 1992, because the state appealed this court's judgment to the Supreme Court. This was a reasonable extension of time and a reasonable delay in bringing defendant to trial a second time. It is questionable whether the time for retrial should even be considered as commencing until the reversal and remand for a new trial became final.

The second continuance was from October 20, 1992, until December 7, 1992, because the prosecutor was involved in an aggravated murder trial before a different judge. The requested continuance

> involved forty-eight days. However, the trial had already been continued until November 30, 1992, upon an earlier defense motion. Therefore, the prosecutor-requested continuance in actuality involved only seven days and was reasonable (November 30 – December 7, 1992).
>
> Accordingly, we are unable to find that defendant was denied his right to a speedy trial under any standard. Even when applying the statutory time provisions, defendant has not demonstrated that the state failed to bring him to trial within a reasonable period of time considering that all the continuances whether "charged" to the state or the defendant were reasonable.

State v. Zerla, No. 94APA03-350 (Franklin Co. App. Ct. 1994), 1994 WL 714458, Exhibit 38 to Return of Writ.

To the extent that petitioner argues a violation of state law, under O.R.C. §2945.71 to §2945.73, such claim is not appropriate for federal habeas corpus review, and will not be considered by this Court. A federal court may review a state prisoner's habeas petition only on the grounds that the challenged confinement is in violation of the Constitution, laws or treaties of the Untied States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a perceived error of state law." *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *Smith v. Sowders,* 848 F.2d 735, 738 (6th Cir.), *cert. denied,* 488 U.S. 866 (1988). A federal habeas court does not function as an additional state appellate court reviewing state courts' decisions on state law or procedure. *Allen v. Morris,* 845 F.2d 610, 614 (6th Cir. 1988). "'[F]ederal courts must defer to a state court's interpretation of its own rules of evidence and procedure'" in considering a habeas petition. *Id.* (quoting *Machin v. Wainwright,* 758 F.2d 1431, 1433

(11th Cir. 1985)). Only where the error resulted in the denial of fundamental fairness will habeas relief be granted. *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

However, the Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to a speedy trial. U.S. Const. amend. VI. The Sixth Amendment speedy trial guarantee is applicable to the states through the due process clause of the Fourteenth Amendment. *Klopfer v. North Carolina,* 386 U.S. 213, 222-23 (1967). The United States Supreme Court has established a balancing test in which four factors must be weighed in evaluating whether the right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker v. Wingo,* 407 U.S. 514, 530 (1972).

The length of the delay for speedy trial purposes is measured from the earlier of the date of the indictment or the date of the arrest. *Cain v. Smith,* 686 F.2d 374, 381 (6th Cir. 1982).[4] The delay must be presumptively prejudicial

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[4] Petitioner does not argue that his right to a speedy trial was violated from the time between his initial arrest and his first trial; neither does petitioner argue that his right to a prompt appeal was violated, after his first or second trial. *See United States v. Smith,* 94 F.3d 204 (6th Cir. 1996). Rather, petitioner appears to argue that his right to a speedy trial was violated based either upon the time between his initial arrest and subsequent retrial, or based upon the date the Tenth District Court of Appeals mandate issued, March 21, 1992, and retrial. The court notes that:

> [t]he Sixth Amendment right to a speedy trial is not primarily intended to prevent prejudice to the accused caused by passage of time; that interest is protected primarily by the

(Continued on following page)

before the court need inquire into the other factors that go into the balance. *Barker v. Wingo,* 407 U.S. at 530. Whether the delay is presumptively prejudicial is determined by the nature and complexity of the crime. *Redd v. Sowders,* 809 F.2d 1266, 1269 (6th Cir. 1987). The more serious the crime, the shorter the toleration of delay. *Id.*

According to petitioner, he was initially arrested on September 1, 1990 and convicted after jury trial on March 1, 1991. *See* Exhibit 35 to Return of Writ. Petitioner filed a direct appeal of his conviction, which was sustained, and the appellate court issued it's [sic] mandate on March 21, 1992. Petitioner's retrial commenced on August 9, 1993. Assuming that petitioner has satisfied the burden of demonstrating that the delay in bringing him to retrial was thus "presumptively prejudicial," *see Doggett v. United States,* 305 U.S. 647, 652 n.1 (1992), the Court will consider the remaining factors set forth under *Barker v.*

> Due Process Clause. *United States v. MacDonald,* 456 U.S. 1, 8, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). The right to a speedy trial is concerned only with the period between a defendant's indictment or arrest and his trial. *Id.* 456 U.S. at 8-9. Therefore, the right does not apply to the appellate process. Nor does the Sixth Amendment right apply when a conviction is reversed on collateral attack. *United States v. Ewell,* 383 U.S. 116, 121, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).
>
> Thus, the right to a speedy trial is not violated by the length of time between the conclusion of the state appellate process and retrial.

Latimore v. Spencer, 994 F.Supp 60, 67 (D.Mass. 1998). The Court nonetheless concludes that under the factors set forth in *Barker v. Wingo, supra,* petitioner's right to a speedy trial was not violated, in any event. *See* discussion, *infra.*

Wingo, supra, to determine whether petitioner's right to a speedy trial was violated.

The second factor under *Barker* concerns reasons for the delay. As noted by the state appellate court, petitioner's retrial was delayed for a short time due to the state's appeal to the Ohio Supreme Court; the prosecution requested two continuances, and defense counsel requested five continuances. Petitioner's retrial was continued from March 21, 1992 to August 31, 1992 due to the state's appeal to the Ohio Supreme Court. Retrial was continued in August because petitioner's attorney withdrew and because the trial judge recused himself. *State v. Zerla,* 94APA03-350 (Franklin Co. App. Ct. 1994), Exhibit 38 to Return of Writ. On August 31, 1992, retrial was continued by defense counsel Jon Browning to November 30, 1992, because Browning needed time to prepare for trial. *Id., see also* Exhibit 58 to return of writ. Retrial was continued on October 21, 1992 to December 7, 1992 because the prosecutor was involved in an aggravated murder trial. *Id.* On November 25, 1992, retrial was continued to February 8, 1993, because petitioner requested new trial counsel who needed time to prepare.[5] *Id.* On February 1, 1993, retrial was continued to March 15, 1993 because defense counsel,

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[5] According to petitioner, Browning withdrew as trial counsel for the following reasons:

> Browning informed appellant that he had until recently been an [a]ss[istant] prosecutor [a]nd that Dan Hogan had told him that Hogan would object to Browning's representation of [petitioner] at trial unless appellant signed a written waiver of the right to conflict-free counsel. This was the sole reason Browning was requested to withdraw as counsel.

Exhibit 35 to Return of Writ.

Thomas DeBacco, had a trial in the United States District Court. *Id.* On February 19, 1993, DeBacco withdrew and new counsel was again appointed.[6] On March 12, 1993, retrial was continued to May 24, 1993 because petitioner's new attorney, Dennis Day, needed time to prepare for trial. Petitioner's signature is on the defense motion requesting a continuance. *Id.* On May 18, 1993, Day requested another continuance to August 9, 1993, in order to prepare for trial and due to a scheduling conflict. Petitioner's signature appears on the defense motion for a continuance, signed by trial counsel "per auth[ority]" of petitioner. *Id.* In sum, petitioner was represented by four different attorneys between the March 21, 1992, mandate, and his August 9, 1993 retrial. As noted by the state appellate court, most of the delay was caused by changes in defense counsel, and defense requests for continuances. Petitioner's allegations that the delay was caused by the state's negligence in appointing three inappropriate attorney's is unsupported by the record before this Court, as is petitioner's claim defense continuances were against his wishes because they were without his signature. In fact, petitioner's signature appears on two of the defense requests for continuance. Exhibit 58 to Return of Writ.

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[6] According to petitioner, the reason that DeBacco withdrew as trial counsel was as follows:

> De[B]acco informed [petitioner] that he had been appointed because he had a reputation for being able to handle "problem" defendants, and that he would not present any expert testimony in [petitioner's] defense. After lengthy discussion of these points, De[B]acco volunteered that he was going to ask the court to allow him to withdraw as counsel.

Exhibit 35 to Return of Writ, petitioner's appellate brief.

> The speedy trial clock is properly tolled in cases where responsibility for the delay lies with the defendant rather than the state. A defendant, for example, will not be heard to complain of a lapse of time attributable to continuances he sought and received from the trial court.

Nelson v. Hargett, 989 F.2d 847, 852 (5th Cir. 1993). Thus, the second factor under *Barker v. Wingo, supra,* weighs against petitioner's claim that his right to a speedy trial was violated.

The third factor under *Barker v. Wingo, supra,* concerns petitioner's assertion of his right to speedy trial:

> The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker v. Wingo, supra, 407 U.S. at 531-532. Petitioner failed to assert his right to a speedy trial until the second day of retrial, August 10, 1993, when he apparently filed a *pro se* motion with the trial court. Transcript, p. 213, Vol. II. Thus, this factor weighs against petitioner's claim that his right to a speedy trial was violated.

Finally, the fourth factor under *Barker v. Wingo, supra*, is whether petitioner was prejudiced by the delay.

> Prejudice is examined in reference to the three interests the right was designed to protect:
>
> > (i) to prevent oppressive pretrial incarceration;

> (ii) to minimize anxiety and concern of the accused; and
>
> (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

United States v. Mundt, 29 F.3d 223, 235 (6th Cir. 1994), citing *Barker*, 407 U.S. at 532 (footnote omitted). Petitioner was released from incarceration on November 12, 1992. *See* Exhibit 38 to Return of Writ. As noted by the respondent, at the time of trial, petitioner was employed at Schmidt's Sausage Haus in Westerville, Ohio, and was registered for classes at Otterbein College. Transcript, p. 928, Vol. V. Petitioner's defense, that the sex had been consensual, did not change from the time of his first trial nor can the Court discern from review of the record how petitioner's defense was prejudiced by the delay in retrial. (*See* transcript, pp. 928-1036, Vol. V). Further, petitioner had a copy of the transcript of his prior testimony for review, and between the time of his first and second trial, was apparently able to obtain documents from the prosecutor that had not been previously available to him for review. Transcript, pp. 954, 1034, Vol. V. Petitioner does not indicate in what manner he was prejudiced by the delay in bringing him to retrial.

> When a defendant is unable to articulate the harm caused by delay, the reason for the delay (factor 2) will be used to determine whether the defendant was presumptively prejudiced. If the government has been diligent in its pursuit of a defendant and delay was "inevitable and wholly justifiable," a speedy trial claim will generally

> fail. [*Doggett,* 505 U.S. at ___-___, 112 S.Ct. at 2692-939 (quoting *Barker,* 407 U.S. at 532, 92 S.Ct. at 2193)]. If, on the other hand, the government has been intentionally dilatory for the purpose of impairing the defendant's defense, violation will almost surely be found. *Id.* Between these two extremes lies negligence. "While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." *Id.*

United States v. Mundt, supra, 29 F.3d at 236-237. Review of the record does not indicate that the government was intentionally dilatory. Instead, as previously noted, it appears that the delay was justifiable or brought about by changes in defense counsel and requests from defense counsel. In sum, the Court concludes that petitioner's right to a speedy trial was not violated.

Petitioner also asserts generally that Ohio's speedy trial statute was unconstitutional as applied to him, and that he was not "treated the same as others" under the statute; but petitioner does not indicate in what manner he was treated differently than other persons under the statute. Petitioner further asserts that he was denied the effective assistance of counsel; but he does not indicate in what manner his counsel was inadequate or how he was prejudiced thereby. Likewise, petitioner generally claims that his conviction was obtained in violation of the Constitution's prohibition against double jeopardy; but he fails to support his claim.

Upon review of the entire record before this Court, the Court concludes that petitioner's third claim is without merit.

III. CLAIM FIVE

In his fifth claim for relief, petitioner asserts that he was unconstitutionally penalized for exercising his constitutional rights. Petitioner argues in relevant part as follows:

> By its direct examination of witnesses, cross-examination of defendant, and closing rebuttal argument, the state drew inference of defendant's guilt, as permitted by Ohio Constitution, from: Defendant's post-arrest silence, consultation with counsel, counsel acting on behalf of defendant as counsel including in obtaining discovery materials, defendant's note-taking at trial at counsel's instruction, and defendant's very presence at his arraignment, at a deposition requested by the state, at pretrial hearings, and even defendant's very presence at trial. . . . At the . . . (1993) trial, the state again hammered away at this same highly prejudicial theory of defendant's guilt, and added that the defendant had on his own done "battle" with the Columbus City Attorney to obtain public records. These public records could not have been used by defendant to "fabricate" testimony given years prior to his obtaining the records! Moreover, there was no inference to be drawn that defendant fabricated his testimony that was not a double inference based upon inference of defendant's guilty [sic] because exercised constitutional and statutory rights and followed the state's procedural rules. . . . Without some specific indicia that a defendant did

> fabricate her testimony, asking the jury to infer that a defendant's exculpatory testimony is untruthful unavoidably requires the jury first to infer that the defendant is guilty because she exercised the right to remain silent, the right to an attorney, the right to discovery, the right to due process, the right to confront witnesses, the right to put the state to its proof, the right to present a defense, and the right to testify. Each and every one of these rights is, thereby, vitiated by the forbidden inference of guilt from the exercise of these rights.

See amended Petition.

The state appellate court made the following findings regarding petitioner's claim:

> . . . defendant contends that the trial court erred in admitting testimony regarding defendant's successful *pro se* public records mandamus action and erred in admitting his prior testimony as prior inconsistent statements when such evidence had no probative value and served to penalize defendant for exercising his rights. Defendant contends that his prior testimony should not have been read in the presence of the jury because it does not meet the definition provided in Evid.R. 801(D) (1) (a), which provides as follows:
>
> > "A statement is not hearsay if:
> >
> > "(1) Prior statement by Witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with his testimony, and was given under oath

> subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition * * * ."

However, during cross-examination, defendant often answered that he could not remember certain details of the evening. He had testified to them during his prior testimony. Therefore, his testimony was inconsistent with his prior testimony and the prior testimony could be used as an admission or impeachment. [Footnote omitted].

Defendant's prior testimony fits within the meaning of Evid.R. 801(D) (2) (a) which provides as follows:

> "A statement is not hearsay if:
>
> " * * * (2) Admission by Party-Opponent. The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity * * * ."

Defendant's prior testimony when offered against him by the state is a party admission and admissible. [Citations omitted].

Defendant also contends that the trial court erred in admitting testimony regarding defendant's successful pro se public records mandamus action. During cross-examination, the prosecutor asked defendant about a pro se mandamus action in which defendant was given the public records and the transcript of the first trial.

In a similar fashion, this court previously decided in this case that a line of questioning which

> involved defendant's post-arrest silence in an attempt to "establish that defendant was given an outline of the state's case against him and ample time to fashion a story which incorporated as many of these facts as possible" was a "permissible method of impeachment." *State v. Zerla, supra*, at 1001. In this second trial, the prosecution was attempting to show that defendant fabricated his story based upon the transcript of the previous trial. Under these circumstances, permitting such method of impeachment was not an abuse of discretion. Moreover, defendant has not demonstrated prejudice by the line of questioning.

State v. Zerla, No. 93APA09-1304 (Franklin Co. App. Ct. 1994), Exhibit 7 to Return of Writ.

Federal habeas review of state court evidentiary rulings is extremely limited. *Waters V. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). Evidentiary questions generally do not rise to a constitutional level unless the error was so prejudicial as to deprive a defendant of a fundamentally fair trial, thereby violating due process. *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988); *see also Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983), *cert. denied*, 464 U.S. 962 (1983). When such errors are alleged, the federal court's inquiry in reviewing these claims is directed to whether the evidence was rationally connected to the crime charged. *Carter v. Jago*, 637 F.2d 449, 457 (6th Cir. 980), *cert. denied*, 456 U.S. 980 (1982). Upon review of the entire record before this Court, the Court concludes that petitioner was not deprived of a constitutionally fair trial by admission of the complained of testimony. Petitioner's claim is without merit.

IV. CLAIM SIX

In his sixth claim for relief, petitioner asserts that he was denied a constitutionally fair trial, his right to confront witnesses, compulsory process, and the right to present a defense due to the trial court's exclusion of the defense expert testimony by Dr. Louise Karl regarding an experiment she had conducted allegedly demonstrating the positive recovery of sperm from the oral cavity. Petitioner argues that state witnesses Sylvia Action [sic] and Detective Straight gave "materially false and misleading testimony." Petitioner asserts prosecutorial misconduct due to the alleged suppression of material evidence favorable to the accused. Finally, petitioner generally asserts that he was denied the effective assistance of counsel and denied the right to trial by jury due to the trial court's exclusion of the testimony by the defense expert.

The state appellate court made the following findings regarding petitioner's claim:

> . . . [D]efendant contends that the trial court erred in excluding the defense expert testimony since such exclusion acted to deny defendant his right to present a defense. Defendant's expert witness was a microbiologist who conducted research for the defendant concerning the possibility of survival of sperm in the oral cavity. She found very little research on the topic but did find an article written by W. F. Enos, M.D., J. C. Beyer, M.D., published in the Journal of Forensic Science which stated that those two scientists had recovered sperm in the oral cavity up to six hours after the ejaculation had occurred. (Tr. Vol. IV, pp. 837-838.)

The expert also conducted a test involving four couples to determine how long sperm could be recovered from the oral cavity. However, neither the test results nor the fact that the test was conducted was conveyed to the prosecuting attorney until the witness was testifying. The prosecution asked the trial court to exclude the testimony and asked for sanctions against the defense attorney for an intentional discovery violation. Initially the trial court excluded the testimony without a voir dire. The defense proffered the testimony, and the prosecutor was permitted to cross-examine the expert.

The trial court then decided " * * * this test is extremely suspect and unreliable, but I believe that I have to agree with counsel that there is some relevancy here." (Tr. Vol. IV, pp. 895-896.) The trial court also stated that it believed that the prosecution had been "sandbagged" because the defense knew of the test on Friday but failed to disclose the information until the expert was on the stand testifying on Monday afternoon. (Tr. Vol. IV, p. 896.) After the court's ruling, defense counsel made a motion for a mistrial based upon an unfair advantage gained by the prosecution by its opportunity to cross-examine the expert outside the presence of the jury and for his ineffective assistance of counsel since he had been found to have "sandbagged" the prosecution and would be subject to sanctions at a later time and could not zealously represent his client. (Tr. Vol. IV, pp. 897-898.) The trial court overruled the motion for mistrial. A continuance was then taken overnight.

The next day, the prosecution asked the trial court to reconsider its ruling and the court excluded the testimony. Defendant contends that this exclusion precluded him from presenting a defense.

The trial court did not exclude defendant's expert from testifying, including giving her expert opinion, but only excluded the testimony concerning the out-of-court test and its result. The exclusion was based upon two reasons: (1) that the defense counsel violated the discovery rules by not disclosing the information; and (2) that the prejudicial value of the testimony outweighed its probative value. The trial court stated as follows:

> "Defense knew of this testing, tells us Friday and never disclosed it. The more the court has had the opportunity to reflect, the court feels prejudicial value firmly outweighs the possible probative value of the evidence due to the casual, unscientific and somewhat bizarre manner of testing." (Tr. Vol. V, p. 913)

Although no evidence of guilt or innocence, defendant argues that the expert's testimony is relevant as to whether sexual activity occurred since there is virtually no physical or medical evidence to support the victim's story, and, therefore, the evidence affects defendant's credibility and should not have been excluded.

We need not decide whether the trial court erred in finding that defense counsel intentionally withheld the test results and violated the discovery rules and whether a less severe sanction than exclusion should have been imposed since the trial court also found that the testimony was too prejudicial to be admitted. The Supreme Court of Ohio has set forth the standard for the admission and exclusion of evidence and has stated in *State* *v. Hymore* (1967), 9 Ohio St.2d 122, 128, certiorari denied (1968), 390 U.S. 1024, that "[t]he trial court has broad discretion in the admission and exclusion of evidence and unless it clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere." *See, also, Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. "Abuse of discretion" means more than an error of law or of judgment, it requires that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, citing *Steiner v. Custer* (1940), 137 Ohio St. 448; *Conner v. Conner* (1959), 170 Ohio St. 85; *Chester Township v. Geauga Co. Budget Comm.* (1976), 48 Ohio St.2d 372. *See, also, Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In this case, the trial court determined that the probative value of the test results was outweighed by their prejudicial value. Under these circumstances, that is not an abuse of discretion.

Additionally, there is another related reason that the test results of the out-of-court-experiment are not admissible as evidence. The test was dissimilar in that it was not conducted under circumstances similar to those involved herein. The trial court characterized the test by stating that it was a " * * * casual, unscientific and somewhat bizarre manner of testing." (Tr. Vol. V, p. 913.) The rule for admissibility of out-of-court experiments or tests has been set forth by the Supreme Court of Ohio in the first paragraph of the syllabus of *St. Paul Fire & Marine Ins. Co. v. Baltimore & Ohio R.R. Co.* (1935), 129 Ohio St. 401, as follows:

> "Evidence of experiments performed out of court, tending to prove or disprove a

> contention in issue, is admissible if there is a substantial similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute * * * [.]"

The conditions do not need to be identical, but only substantially similar to the conditions at the time of the occurrence in dispute. No similarity was demonstrated in this case. The determination of admissibility of out-of-court experiments is a matter within the sound discretion of the trial court and will not be disturbed by a reviewing court absent an abuse of discretion. *Columbus v. Taylor* (1988), 39 Ohio St.3d 162; *St. Paul Fire & Marine Ins.*, *supra*, at paragraph two of the syllabus; *Bush v. Hoelker* (Oct. 12, 1989), Franklin App. No. 89AP-185, unreported (1989 Opinions 3953, 3959).

In this case, the out-of-court experiment was substantially dissimilar. For example, the defense expert admitted that the conditions involving a rape, rather than consensual oral sex, could affect the results. (Tr. Vol. IV, p. 865.) Additionally, the swabs in the out-of-court experiment were taken by the woman herself rather than another person as was done at the hospital. The expert acknowledged that one doing the swabbing on oneself would, " * * * have the feel. They would be able to feel the cracks and the crevices of their mouths, under their tongue and also it would be easier to swab their own pallets without choking or gagging, that type of thing." (Tr. Vol. IV, p. 862.) Moreover, the expert admitted that the number of times a person inhales, swallows, or cries could affect the results. (Tr. Vol. IV, p. 867; 880-881.) The differences are significant

> enough to make the out-of-court experiment substantially dissimilar and, therefore, inadmissible.
>
> Moreover; defendant was not "materially prejudiced" by the exclusion of these test results. The expert was able to testify and render an opinion. The expert stated as follows:
>
> > "Q: Are you here to say that swabs were taken two and a half hours after there was ejaculation orally and that those swabs come back negative for sperm.
> >
> > "A. I am here to suggest that is a possibility." (Tr. Vol. V, p. 922.)
>
> The expert was also able to discuss the article written by W.F. Enos, M.D. and J.C. Beyer, M.D., which was published in the Journal of Forensic Science and stated that those two scientists had recovered sperm in the oral cavity up to six hours after the ejaculation had occurred. Since defendant was able to provide the expert opinion evidence to the jury, he was not materially prejudiced by the exclusion of the test results, and the trial court did not abuse its discretion in excluding the test results. Consequently, the second assignment of error is not well-taken.

State v. Zerla, No. 93APA09-1304 (Franklin Co. App. Ct. 1994), Exhibit 7 to Return of Writ.

These findings are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254 (d), (e), and upon review of the record, this Court finds no reason to disturb these findings here. Again, federal court review of state evidentiary matters is extremely limited, *see* discussion, *supra*, and only where the error resulted in the denial of fundamental fairness will habeas relief be granted. *Cooper v. Sowders, supra*. Upon review of the record, the Court does not deem this to be such a case. The Court concludes that petitioner was not denied the right to a constitutionally fair trial, the right to present evidence, the right to confront witnesses, the right to a jury trial, or the right to compulsory process of witnesses by the trial court's ruling.

Petitioner also asserts prosecutorial misconduct due to the alleged suppression of favorable evidence and the ineffective assistance of counsel, apparently due to counsel's failure to object to the state's misconduct.[7] The state appellate court made the following findings regarding petitioner's claims:

> In his petition, petitioner broadly asserts that he was denied effective assistance of counsel "in that counsel failed to secure and present available evidence which had a reasonable probability of affecting the verdict, and that counsel failed to object to evidence and misconduct by the state prejudicial to petitioner." However, defendant has not set forth "sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *State v. Jackson* (1980), 64 Ohio St.2d 197, syllabus. *See, also, Hackney, supra*. Specifically, defendant's accompanying affidavit does not indicate what evidence his counsel

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[7] It is unclear from the petition on what basis petitioner asserts the ineffective assistance of counsel. However, this was the claim raised by petitioner in his September 23, 1996 petition for post conviction relief. See Exhibits 46 to 51 to Return of Writ.

> failed to obtain nor does defendant point to any specific false evidence or misconduct by the prosecution for which his counsel should have raised an objection. . . .
>
> Defendant's petition also raised a claim of prosecutorial misconduct, alleging, similar to his claim above, that the state withheld exculpatory evidence and presented false evidence at trial. In *Brady v. Maryland* (1963), 83 S.Ct. 1194, 1196-1197, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
>
> Defendant asserts in his affidavit that he has possession of a "large volume of documentary evidence" regarding his claim of prosecutorial misconduct. However, as noted by the trial court, defendant failed to specifically identify any such evidence. Thus, in addition to failing to point to the specific evidence which the state either withheld or presented in a false manner (or indicating how such evidence was material), defendant has not submitted any proof of the existence of such evidence despite the allegation that the evidence is in his personal possession. Defendant's contention that the trial court erroneously imposed a heightened burden as to his *Brady* claim is without merit. Rather, apart from defendant's bare assertions, in the absence of any facts indicating prosecutorial misconduct, the trial court properly held that a hearing was not warranted. . . .

Exhibit 51 to Return of Writ.

The scope of federal habeas review of a claim of prosecutorial misconduct is narrow. A federal court does not sit as an appellate court employing supervisory powers to rectify ordinary trial error in cases before it for habeas review. *Donnelly v. De Christoforo*, 416 U.S. 637 (1974). Rather, The Court must consider only whether the prosecutor's conduct was so egregious as to deny the petitioner fundamental fairness. *Id.* at 642-43; *Martin v. Foltz*, 773 F.2d 711, 716-17 (6th Cir.1985), 605, 607 (6th Cir. 1982) (en banc).

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the of the [sic] good faith or bad faith of the prosecution." *Workman v. Bell*, 178 F.3d 759, 767 (6th Cir. 1998), citing *Brady v. Maryland*, 373 U.S. at 87. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Norris v. Schoten,* 146 F.3d 314, 334 (6th Cir. 1998) citing *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991). No *Brady* violation occurs "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source." The undisclosed evidence must have been favorable to the accused. *Elmore v. Foltz*, 768 F.2d 773, 776 (6th Cir. 1985).

Petitioner has submitted Petitioner's Exhibits B, C, D, E and F in support of his claim. Petitioner argues that the prosecutor knowingly elicited false testimony from Sylvia Action and Detective Straight regarding the recovery of sperm from a rape victim's mouth after ejaculation, made improper closing argument and conducted improper cross-examination in this regard.[8] Petitioner complains of the following testimony by Detective Straight.

> Q. In your twenty-three years [on the sexual assault squad], are you aware of the positive result for semen or sperm as a result of ejaculation in a victim's mouth?
>
> A. There has only been one that I can recall, and I don't know all the circumstances that were surrounding that because another detective who came into the sexual abuse squad about seven years ago had the case and I know from him that one came back positive out of the oral examination. I am not an expert on this. It was explained to me because the acids in the mouth –
>
> * * *
>
> Q. . . . So you are telling us in all the cases you have ever done you have never had one come back positive.
>
> A. Not myself personally, sir.

Transcript, p. 555-556, Vol. III. *See also* Transcript, pp. 578-80, Vol. III. Petitioner complains of the following testimony by Sylvia Acton:

> Q. Would you expect to find the presence of sperm or semen on the oral slides or swabs after two and a half hours?

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[8] Petitioner refers to numerous portions of the transcript, in which he asserts that the prosecution acted improperly. *See,. e.g., Transcript*, pp. 906, 908, 799-802, 812-815, 830-850, 895, 1134-1135, 1150-1152, 1155-1156. *See* Amended Petition.

A. It's very rare that I do.

Q. Can you put that into some context for us?

A. I have not yet found sperm on any slide submitted to the crime lab yet this year.

* * *

Q. In your entire career . . . do you have a recollection of how many times you find sperm – and so we are clear, you don't find semen orally, correct? That's not something you would expect?

A. Well, not in a live person. Usually by the time we get them the semen has dissipated or the chemical that we are looking for in the semen has been diluted or dissipated, so we very seldom find the semenal levels of the chemical we are checking for in the mouth.

Q. How many times have you found sperm orally?

A. I don't know, but it is not very often. I would say not more than once a year. In a live victim.

Transcript, pp. 769-771, Vol. IV; *see also* pp. 771-817.[9] Petitioner argues that the foregoing testimony was false

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[9] On cross-examination, Acton testified as follows:

Q. Are you aware of studies that show that semen and sperm have been recovered from the oral cavity up to six hours?

A. I am sure that's very true.

Q. In a living person?

A. I am sure that's very true.

(Continued on following page)

based upon police documents (Petitioner's Exhibits B, C, D and E)[10] which record instances of sperm recovered from alleged rape victims. Petitioner asserts that records indicate that sperm was recovered in one case for Detective Straight, and that Acton's logs indicate that out of thousands of cases in which tests for sperm were conducted, three of those tests similar in circumstances to the instant case were positive for recovery of sperm. Even assuming these assertions as true and after review of the entire record before this Court, the Court concludes that petitioner has failed to establish that any of the testimony of Sylvia Acton or Detective Straight was materially false or that the result of the proceeding would have been different had the evidence regarding actual sperm recovery referred to by petitioner been presented to the jury. Petitioner has further failed to establish that trial counsel was inadequate or that petitioner was prejudiced by any actions or inactions of trial counsel, as set forth under *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel effectively cross-examined both Acton Detective

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> Q. Are you aware also those studies show recovery after that period of time despite rinsing of the mouth, brushing teeth, gargling, even eating food?
>
> A. I have heard that, yes, sir. I eve [sic], excuse me, I have read that.
>
> Q. . . . And that does in fact contradict somewhat your testimony here today, does it not?
>
> A. I don't believe so. I still believe it's very rare to find it orally.

Transcript, p. 776, Vol. IV.

[10] Petitioner also submitted Petitioner's Exhibits G and R and a transcript of the September 26, 1990 bond hearing in this case in support of his claim.

Straight regarding their testimony; failure to submit lengthy records regarding tests for sperm recovery may well have been sound trial strategy. *Strickland*, at 689. Review of the record reveals no indication of prosecutorial misconduct or concealment of evidence from the defense. In sum, petitioner's allegations are completely unsupported by the record before this Court. Petitioner's claim is without merit.

IV. CLAIM SEVEN

In his seventh claim for relief, petitioner does not attack the constitutionality of his criminal convictions. Instead, petitioner asserts that he has been improperly denied "good time" credit toward service of his sentence by the Ohio Department of Rehabilitation and Correction. Respondent failed to address petitioner's claim, and from the record before this Court it does not appear that petitioner has attempted to present this claim to the Ohio courts. *See* Petitioner's Exhibit K. While it thus appears that petitioner has failed to exhaust state remedies as to his claim, under Rule 2(d) of the Rules governing §2254 cases, claim seven, in any event, would not be properly considered as part of the instant petition:

> Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

Id. A petitioner may not present a "mixed" petition containing both exhausted and unexhausted claims to federal court, *see Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *O'Guinn v. Dutton*, 88 F.3d 1409, 1412 (6th Cir. 1996), and the Court ordinarily would therefore dismiss the entire petition when a claim appears to be unexhausted. However, since it appears that claim seven is wholly unrelated to the first six claims challenging the constitutionality of petitioner's criminal convictions and, thus, would not properly be considered as part of the instant petition, the claim is DISMISSED. After he has properly exhausted all state remedies as to this claim, petitioner may assert it in a new petition.

Based upon the foregoing, the instant petition is DENIED and this action is hereby DISMISSED.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Terrance Edward Zerla

Plaintiff

v.

Gary Mohr, Warden

Defendant

JUDGMENT IN A CIVIL CASE

Case Number C-2-98-1111

Judge James L. Graham

(Filed Sep. 22, 2000)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial before the Court. The issues have been tried or heard and a decision has been renderd.

[X] Decision by Court without trial or hearing.

IT IS ORDERED AND ADJUDGED that the petition for a writ of habeas corpus is DENIED and this action is DISMISSED.

September 22, 2000
Date

KENNETH J. MURPHY
Clerk

/s/ Beverly J. White
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Terrance Edward Zerla	:	
Petitioner	:	Case No. C-2-98-1111
v.	:	Judge Graham
Michael Randle, Warden	:	Magistrate Judge Abel
Respondent	:	

ORDER

(Filed Oct. 26, 2000)

Petitioner Terrance Edward Zerla brings this action under 28 U.S.C. §2254 for a writ of habeas corpus. On September 21, 2000, the Court issued an Opinion and Order denying the petition for writ of habeas corpus.

Petitioner has responded with a flurry of motions, arguing that the Court should have granted him the writ of habeas corpus. The gist of petitioner's argument is that he had not engaged in any sexual conduct, as defined by Ohio Revised Code §2907.01(A). He continues to argue that there was no penetration; therefore, there was no rape. Petitioner further maintains that the prosecution offered false testimony and suppressed evidence that would have permitted him to establish this defense. The Court fully considered these arguments at pp. 41-53 of the September 21, 2000 Opinion and Order.

At trial, petitioner admitted kissing and fondling the victim, who was a stranger to him, but denied any other sexual contact. The victim testified that petitioner forced her to have oral sex with him. The jury credited the victim's testimony and rejected petitioner's. None of the errors alleged in the petition denied Zerla his constitutional right to a fair trial.

Petitioner Zerla's October 10, 2000 motions for an order to file application *ex parte* (doc. 58), for leave to attach exhibits (doc. 59), motion for order to expand record (doc. 60), for order to substitute page 137 (doc. 61), for order requiring respondent to file portions of the state record (doc. 62), for appointment of counsel (doc. 63), and for leave to conduct discovery (doc. 64) are DENIED. The matter was fully submitted to the Court for decision when it issued its September 21, 2000 Opinion and Order.

For the reasons stated above, petitioner Zerla's October 13, 2000 motion to strike judgment and for reconsideration of judgment (doc. 65) is DENIED.

/s/ James L. Graham
James L. Graham
United States District Judge

00-4510

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRANCE EDWARD ZERLA,)
Petitioner-Appellant,) ORDER
v.) (Filed Sep. 9, 2002)
JAMES ERWIN, WARDEN,)
Respondent-Appellee.)

BEFORE: DAUGHTREY and MOORE, Circuit Judges; and SIMPSON,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Charles R. Simpson, III, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk